Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

THE ESTATE OF KEVIN SCHWING,
Petitioner,

v.

THE LILLY HEALTH PLAN, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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November 23, 2010

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QUESTIONS PRESENTED

1. Whether the Third Circuit, in overturning the District Court's ruling, decided an important federal question that directly conflicts with this Court's holding in *Metropolitan Life Insurance Co. v. Glenn*, 128 S.Ct. 2343 (2008), requiring courts to "take account of several different considerations of which a conflict of interest is one" when determining the lawfulness of benefit denials under ERISA.

2. Whether the Third Circuit's *de novo* resolution of fact issues: (a) improperly usurped the function that the civil justice system reserves for finders of fact, whether district courts or juries; and (b) violated the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

3. Whether the Third Circuit perpetrated a manifest injustice by applying *Metropolitan Life Insurance Co. v. Glenn*, 128 S.Ct. 2343 (2008), to the facts of this case rather than the law in effect at the time the District Court rendered its decision, when the case was tried on March 1-8, 2005, the District Court opinion was published on September 29, 2006, and *Glenn* was decided on June 19, 2008.

PARTIES TO THE PROCEEDINGS

The Parties to this action are listed below: the Petitioner, Estate of Kevin Schwing, was Plaintiff and Appellee in the court below. The Lilly Health Plan; The Eli Lilly and Company Life Insurance and Death Benefit Plan; The Eli Lilly and Company Health Care Flexible Spending Plan; The Eli Lilly and Company Dependent Day Care Flexible Spending Plan; The Lilly Severance Pay Plan; The Eli Lilly and Company Holiday and Vacation Plan; The Lilly Dental Plus Plan; PCS Pharmacy Benefits Management Service Program; The Lilly Employee Savings Plan; The Lilly Retirement Plan; Eli Lilly and Company, Individually and as Plan Sponsor, Fiduciary and Administrator of The Lilly Retirement Plan, and The Lilly Severance Pay Plan, and The Eli Lilly and Company Holiday and Vacation Plan, and The Lilly Health Plan, and The Lilly Dental Plus Plan, and PCS Pharmacy Benefits Management Service Program; The Employee Benefits Committee, as Administrator and Named Fiduciary of the Lilly Retirement Plan, and The Lilly Severance Pay Plan, and The Eli Lilly and Company Holiday and Vacation Plan, and The Lilly Health Plan, and The Lilly Dental Plus Plan, and PCS Pharmacy Benefits Management Service Program; Lilly Global Shares Stock Option Plan were Defendants and Appellants in the court below.

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INTRODUCTION

Petitioner, Estate of Kevin Schwing, respectfully petitions for a Writ of Certiorari to review the April 14, 2009, decision of the United States Court of Appeals for the Third Circuit. That decision so far departed from Supreme Court precedent and violated Petitioner's Fifth and Fourteenth Amendment rights under the Constitution of the United States by: (1) ignoring the plain language in *Metropolitan Life Insurance Co. v. Glenn*, 128 S.Ct. 2343, 2351 (2008), requiring courts to "take account of several different considerations of which a conflict of interest is one" when determining the lawfulness of benefit denials under ERISA, as the Third Circuit only considered the conflict of interest and ignored various other factors; (2) usurping the District Court's function to be the finder of fact and judge credibility; and (3) perpetrating a manifest injustice by applying *Glenn* to the facts of this case rather than the law in effect at the time the District Court rendered its decision that accorded significant weight to a plan administrator's conflict of interest in determining whether the plan administrator abused its discretion.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit dated April 14, 2009, is reported at 562 F.3d 522 and is reproduced in Appendix A at pages 1a-13a. The Third Circuit's decision denying the petition for rehearing with suggestion for rehearing en banc dated August 26, 2010, is unreported and is reproduced in Appendix C at pages 58a-60a. The decision of the United States District Court for the Eastern District of Pennsylvania dated September 29,

2006, is unreported and is reproduced in Appendix B at pages 14a-57a.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The District Court had subject matter jurisdiction over this action under 29 U.S.C. § 1132(e)(1), Section 502(e)(1) of the Employee Retirement Income Security Act of 1974 (ERISA), and 28 U.S.C. § 1331. The District Court's decision was issued on September 29, 2006. (Appendix B, pp. 14a-57a). The Third Circuit had jurisdiction under 28 U.S.C. § 1291. The judgment of the Third Circuit was issued on April 14, 2009. (Appendix A, pp. 1a-13a). Petitioner's timely petition for rehearing and rehearing en banc was denied on August 26, 2010. (Appendix C, pp. 58a-60a).

STATUTES AND REGULATIONS INVOLVED

The Employee Retirement Income Security Act of 1974, as amended ("ERISA"), provides in pertinent part:

> A civil action may be brought by a participant or beneficiary to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

29 U.S.C. § 1132(a)(1)(B).

> A civil action may be brought by a participant, beneficiary, or fiduciary to obtain other appropriate equitable relief to enforce any

> provisions of this subchapter or the terms of the plan.

29 U.S.C. § 1132(a)(3)(B)(ii).

> In accordance with regulations of the Secretary, every employee benefit plan shall afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

29 U.S.C. § 1133(2).

STATEMENT OF CASE

A. Schwing's Employment with Eli Lilly and Co.

Petitioner's decedent, Kevin Schwing ("Schwing"), was employed as a sales representative by Respondent, Eli Lilly and Company ("Lilly"), during the period from July 4, 1980, to August 22, 2001. (Appendix B, p. 22a). Beginning in 1991, Mr. Schwing was employed by Lilly as a retail sales representative in Harrisburg, Pennsylvania. (Appendix B, p. 22a). On January 1, 2001, Jeffrey Hallinin ("Hallinin") took over as the Harrisburg District Sales Manager, and was Mr. Schwing's supervisor. (Appendix B, p. 22a).

On August 21, 2001, Hallinin requested Mr. Schwing to attend a meeting the next day, August 22, 2001. (Appendix B, p. 23a). Prior to the August 22, 2001, meeting, Hallinin discussed his concerns about Mr. Schwing's call reporting and performance with Hallinin's supervisor, Valerie Hobson ("Hobson"), and Valerie Martin ("Martin"), Senior Personnel

Representative for Human Resources. (Appendix B, p. 23a).

On August 22, 2001, Mr. Schwing attended a meeting where Hallinin and Martin were present. (Appendix B, pp. 24a). Hallinin conducted the August 22, 2001, meeting using a script he prepared with Martin before the meeting. (Appendix B, p. 23a). One section of the script included a statement that Mr. Schwing was "terminated." (Appendix B, p. 23a). At the meeting, Mr. Schwing was asked about sales call data for Good Hope Family Practice and Middletown Family Practice. (Appendix B, p. 24a). Although Mr. Schwing denied intentionally fabricating sales call data, Mr. Schwing was terminated for misconduct by falsifying call reports. (Appendix B, pp. 24a-25a).

B. Schwing's Claim for Severance Benefits

The Lilly Severance Plan ("Severance Plan") is one of several employee benefit plans at Lilly. (Appendix B, p. 25a). The Employee Benefits Committee ("EBC") reviews all claims under the Severance Plan, and is the named fiduciary under ERISA. (Appendix B, p. 26a).

By letter dated September 28, 2001, Mr. Schwing, through his attorney, Elliott Strokoff ("Strokoff"), made a formal claim for severance benefits under the Severance Plan. (Appendix B, p. 28a). During the time Mr. Schwing's severance claim was brought before the EBC, Attorney Sandra Sommers held the position of Associate General Counsel of Human Resources for Respondent Lilly, and counsel to the EBC. (Appendix B, p. 29a). In response to the September 28, 2001, letter, Attorney Sommers wrote a letter in response

informing Mr. Schwing that the EBC would consider Mr. Schwing's claim on November 9, 2001, and that Mr. Schwing could provide the EBC with additional information to support his claim. (Appendix B, p. 29a).

Prior to the November 9, 2001, EBC meeting, Attorney Sommers requested that Hallinin draft two documents: one entitled "Employee Background" and one entitled "Summary of August 22, 2001 Meeting" for use by the EBC in reviewing Mr. Schwing's claim for severance benefits. (Appendix B, p. 29a). Martin, also at the request of Sommers, drafted a document entitled "Meeting Summary with Kevin Schwing August 22, 2001." (Appendix B, pp. 29a-30a).

On November 7, 2001, each member of the EBC was sent an agenda for the November 9, 2001, meeting by e-mail. (Appendix B, p. 30a). The agenda included a recommendation from Attorney Sommers that Mr. Schwing's claim for severance benefits be denied. (Appendix B, p. 30a). On November 8, the EBC members were sent various "pre-read" materials for review prior to the November 9, 2001, meeting. (Appendix B, p. 30a). These materials included the summaries created by Hallinin and Martin. (Appendix B, p. 30a). Neither Mr. Schwing nor his counsel, Attorney Strokoff, was provided the Hallinin and Martin summaries prior to the November 9, 2001, meeting. (Appendix B, p. 30a). The EBC did not receive Martin's handwritten notes, nor the script Hallinin used during the August 22, 2001, meeting with Mr. Schwing. (Appendix B, p. 30a).

On November 8, 2001, another letter on behalf of Mr. Schwing was faxed to Attorney Sommers, but she

did not present it to the EBC during the November 9, 2001, meeting. (Appendix B, p. 30a).

Attorney Sommers was ultimately the presenter of Mr. Schwing's severance claim at the November 9, 2001, meeting. (Appendix B, p. 31a). She presented a PowerPoint slideshow which also included her proposed recommendation and grounds for denying Mr. Schwing's claim. (Appendix B, p. 31a). Attorney Sommers took a major role in determining the content of the pre-read materials. (Appendix B, p. 31a).

After the November 9, 2001, meeting, Attorney Sommers returned to her office and found the November 8, 2001, letter submitted on Mr. Schwing's behalf by Attorney Strokoff. (Appendix B, p. 31a). Prior to submitting Attorney's Strokoff's letter to the EBC, Attorney Sommers contacted Hallinin, Martin, and Melissa Popa ("Popa") of the Human Resources Department to have them respond to Mr. Schwing's allegations. (Appendix B, pp. 31a-32a). Based upon the responses of Hallinin, Martin, and Popa, Attorney Sommers produced a document that contained both Mr. Schwing's averments together with responses and forwarded that document to the EBC members for their consideration. (Appendix B, p. 32a). Attorney Sommers did not submit the document to Mr. Schwing's counsel. (Appendix B, p. 32a).

The EBC was unaware that Mr. Schwing was provided neither the Hallinin nor Martin summaries, nor the responses they both made to Attorney Strokoff's November 8, 2001, letter. (Appendix B, p. 32a). Nonetheless, the EBC reconsidered its November 9, 2001, decision in light of the information provided on behalf of Mr. Schwing and again voted to deny Mr.

Schwing's claim. (Appendix B, p. 32a). By letter dated November 30, 2001, the EBC notified Attorney Strokoff that it had denied Mr. Schwing's claim under the severance plan. (Appendix B, p. 32a).

C. Appeal of EBC's Denial of Schwing's Claim

On December 10, 2001, through his attorney, Mr. Schwing appealed the denial of his severance claim. (Appendix B, p. 32a). On January 25, 2002, Attorney Sommers responded to the December 10, 2001, letter and advised that Mr. Schwing had until February 28, 2002, to provide any additional information for the next EBC meeting on March 5, 2002. (Appendix B, p. 33a). By letter dated February 28, 2002, Attorney Strokoff submitted additional information to the EBC. (Appendix B, p. 33a). On March 2, 2002, Mr. Schwing sent a letter to the severance committee outlining additional information for the EBC's review and specifically addressed the contentions of Hallinin's summaries and his responses to the November 8, 2001, letter from Attorney Strokoff. (Appendix B, p. 33a).

The EBC did not meet as scheduled on March 5, 2002. (Appendix B, p. 33a). In fact, the EBC never met to discuss Mr. Schwing's appeal. (Appendix B, p. 33a). The matter was decided on a "consent to action." (Appendix B, pp. 34a). The EBC claims it never received the March 2, 2002, letter sent by Mr. Schwing, and did not consider it. (Appendix B, p. 34a).

On April 15, 2002, Mr. Schwing sent two letters dated April 9 and 13, 2006 to Laura Lemmons ("Lemmons"), a paralegal in Attorney Sommers department, in support of his claim for severance benefits. (Appendix B, p. 34a). Attorney Sommers did

not forward the April 9, 2002, and the April 13, 2002, letters from Mr. Schwing to the EBC. (Appendix B, p. 34a).

By letter dated April 22, 2002, Mr. Schwing was notified that the EBC denied his appeal for severance benefits. (Appendix B, p. 34a). The EBC did not conduct a hearing on either Mr. Schwing's original claim for severance benefits or his appeal. (Appendix B, p. 34a).

On October 12, 2007, Mr. Schwing died as a result of a pulmonary embolism.

D. Procedural History

Mr. Schwing brought suit in the United States District Court for the Eastern District of Pennsylvania alleging that the decision of the EBC denying his claim for severance benefits was arbitrary and capricious[1] and Attorney Sommers' conduct constituted a conflict of interest. (Appendix B, p. 37a). Following a bench trial on March 1-8, 2005, the District Court entered judgment for Mr. Schwing on September 29, 2006, finding that the EBC's decision was tainted by a conflict of interest and that the EBC failed to adequately investigate Mr. Schwing's claim. (Appendix B, p. 19a; Appendix A, p. 5a). The District Court also found that the denial of benefits was arbitrary and capricious irrespective of a conflict of interest. (Appendix A, pp. 44a-49a).

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[1] The terms "arbitrary and capricious" and "abuse of discretion" are synonymous in the ERISA context. (Appendix A, p. 8a, fn. 2).

Respondent appealed the judgment of the District Court to the Third Circuit. (Appendix A). Appellate jurisdiction was based upon 28 U.S.C. § 1291. Prior to the Third Circuit hearing the case, Mr. Schwing died as a result of a pulmonary embolism and his estate was substituted as Appellee. While reversing and finding for Eli Lilly, the Third Circuit issued its own opinion on April 14, 2009, and held that there was no conflict of interest and the EBC did not abuse its discretion when it denied Mr. Schwing's claim for severance benefits. (Appendix A, pp. 7a-10a). Mr. Schwing's estate petitioned the Third Circuit for rehearing with a suggestion for rehearing en banc on April 28, 2009. (Appendix C). Mr. Schwing's estate was subsequently denied a Panel Rehearing by the Third Circuit on August 26, 2010. (Appendix C).

REASONS FOR GRANTING THE PETITION

Petitioner requests a Writ of Certiorari to review the opinion of the United States Court of Appeals for the Third Circuit wherein that court reversed the District Court's finding that Petitioner was entitled to benefits pursuant to an ERISA-governed plan.

I. THE THIRD CIRCUIT'S DECISION IGNORES THIS COURT'S PRECEDENT SET FORTH IN *GLENN* REQUIRING COURTS TO LOOK AT SEVERAL DIFFERENT FACTORS, ONE OF WHICH IS A CONFLICT OF INTEREST WHEN DETERMINING THE LAWFULNESS OF BENEFIT DENIALS UNDER ERISA

The Third Circuit ignored established, undisputed Supreme Court precedent and relied upon a mere instinct to conclude that the plan administrator's

decision to deny Petitioner's decedent's benefits was not an abuse of discretion. The Third Circuit lazily ignored the fact that the District Court analyzed several different considerations, one of which was a conflict of interest, in finding that the plan administrator's decision to deny benefits was an abuse of discretion. Rather, the Third Circuit simply focused on one factor, a conflict of interest, in overturning the District Court's opinion. This blatant misapplication of this Court's decision in *Glenn* is a miscarriage of justice and must be corrected.

In *Glenn*, 128 S.Ct 2343 (2008), this Court sought to clarify years of confusion as to how a court should consider an ERISA plan administrator who both determines eligibility and pays benefits. In *Glenn*, this Court established a uniform standard of review to be applied when a plan administrator operates under a conflict of interest. Reaffirming that abuse of discretion review applies when the administrator has discretionary authority to determine whether an employee's claim for benefits is valid, *Id.* at 2348, this Court held that a conflict of interest exists when the plan administrator both determines eligibility for benefits and pays the benefits out of its own pocket. *Id.* at 2346. Clarifying what this Court set forth in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), "namely, that a conflict should be weighed as a 'factor in determining whether there is an abuse of discretion,'" *id.* at 115, this Court in *Glenn* elaborated on *Firestone* and stated:

> We believe that *Firestone* means what the word "factor" implies, namely, that when judges review the lawfulness of benefit denials, they will often take account of several different

> considerations of which a conflict of interest is one. This kind of review is no stranger to the judicial system. Not only trust law, but also administrative law, can ask judges to determine lawfulness by taking account of several different, often case-specific, factors, reaching a result by weighing all together.

Glenn, 128 S.Ct at 2351.

In accordance with *Glenn*, the District Court correctly analyzed several different considerations, one of which was a conflict of interest, in finding that the plan administrator's decision to deny Petitioner's decedent's benefits was an abuse of discretion. In fact, the District Court conducted two separate analyses: it first looked only at the conflict of interest to determine whether the plan administrator abused its discretion when denying Petitioner's decedent's benefits; secondly, the District Court ignored the conflict of interest and looked at several different considerations to determine whether the plan administrator abused its discretion when denying Petitioner's decedent's benefits.

First, the District Court looked only at the conflict of interest and found that the decision to deny Petitioner's decedent's benefits was an abuse of discretion. The relevant portions of the District Court's findings are:

> We conclude that Attorney Sommers is free to act as counsel for the EBC, but is not free to also act as counsel for the company at the same time. We conclude that this is exactly what happened in the case.

Furthermore, we conclude that Attorney Sommers was not required to act as actual counsel or advocate for Mr. Schwing, (he had his own counsel Mr. Strokoff), but Attorney Sommers could not act against Mr. Schwing's interests because he is also her client for purposes of her representation to the EBC.

Rather, what Attorney Sommers did was act as both counsel for Lilly and for the EBC at the same time. Attorney Sommers' actions in this case created a serious conflict of interest and denied plaintiff a full and fair review by the EBC.

Attorney Sommers acted as a gatekeeper for the documents that the EBC would consider. Specifically, she requested that Mr. Hallinin and Ms. Martin provide summaries of the events concerning plaintiff's termination of employment. However, Attorney Sommers did not provide those summaries to plaintiff or his counsel before the appeal process.

Moreover, when Attorney Strokoff submitted his November 8, 2001, letter on behalf of plaintiff, Attorney Sommers contacted Mr. Hallinin, Ms. Martin and Ms. Popa and requested that they respond to plaintiff's allegations. Once again, these responses were not provided to plaintiff until after the EBC ruled on his original claim for benefits.

All of Attorney Sommers actions were consistent with her role as in-house counsel for

> Lilly, not as counsel for the EBC and certainly not in the interests of Mr. Schwing.
>
> In addition, Attorney Sommers included in her presentation to the EBC a recommendation that Mr. Schwing's claim for severance benefits was denied. This was clearly against Mr. Schwing's interest.
>
> Finally, with regard to plaintiff's appeal of the original determination by the EBC to deny benefits, Attorney Sommers kept from the EBC certain documents sent by plaintiff after the February 28, 2002 deadline for submission of materials, but before the April 22, 2002 decision by the EBC to deny plaintiff's appeal. We conclude this act was done to plaintiff's detriment.

(Appendix B, pp. 42a-43a). Based on the above, the District Court concluded that "Attorney Sommers operated under a serious conflict of interest which denied plaintiff the full and fair review that is required under ERISA and the Severance Plan" and found the decision to deny Petitioner's decedent's benefits was an abuse of discretion. (Appendix B, p. 44a).

In order to conduct a complete analysis of the facts, the District Court **excluded** the conflict of interest and still found that the decision to deny Petitioner's decedent's benefits was an abuse of discretion based on the EBC's failure to undertake a full investigation of Petitioner's decedent's claim. The District Court looked first at the EBC's review of Petitioner's decedent's initial claim, specifically, the EBC's mistake of "simply credit[ing] the statements, investigations and

conclusions of the company representatives" and "fail[ing] to engage in any independent analysis with conflicting accounts." (Appendix B, p. 49a). The relevant portions of the District Court's findings are as follows:

> In its initial determination, the EBC had before it the following documents: (1) the Employee Background summary prepared by Jeff Hallinin; (2) the Summary of August 22, 2001 Meeting prepared by Jeff Hallinin; (3) the Summary of August 22, 2001 Meeting prepared by Valerie Martin; (4) the November 8, 2001 Letter from Attorney Strokoff with the superimposed responses from Mr. Hallinin, Ms. Martin and Ms. Popa; and (5) the presentation slides from the November 9, 2001 meeting of the EBC prepared by Attorney Sommers.
>
> A review of the materials submitted to the EBC reveals that there are conflicting explanations of the events between the pertinent individuals. Specifically, Mr. Hallinin and Ms. Martin alleged that Mr. Schwing knew the reasons for his termination. Plaintiff disputed this. In addition, Mr. Hallinin and Ms. Martin asserted that when the calls were placed by Mr. Hallinin to the Good Hope Family Practice and the Middletown Family Practice they were told that some of the doctors plaintiff reported seeing on certain days were not in the office that day.
>
> Plaintiff contended to the contrary, that according to Jeannie, the receptionist at Good Hope Family Practice, the question asked by Mr. Hallinin was whether the doctors were "on

the schedule" on a given day? Plaintiff contended that was not the correct question. Rather, the correct question should have been whether the doctors were "in the office" on a particular day, notwithstanding whether or not they were on the schedule.

Plaintiff further asserted that the doctors were in the office on the days in question and that he saw all of the doctors which he reported seeing. Moreover, plaintiff asserted that Mr. Hallinin and Ms. Martin conceded at the August 22, 2001 meeting that Mr. Schwing was present at the group practices and that he possessed written confirmation of his presence.

Next, plaintiff asserted to the EBC his belief that the actions of Mr. Hallinin and Ms. Martin were in retaliation for a prior grievance he filed involving Sales Manager Val Hobson. Mr. Hallinin and Ms. Martin denied that there was any retaliation.

Ms. Schlehuber testified that the EBC relied on the company "process" in making its decision; that it was not the role of the EBC to review the reasons or rationale for the termination of plaintiff's employment; that the EBC did not debate the actual actions of the company which resulted in the determination to fire Mr. Schwing; that the EBC relied on the investigation of the company; and that it took the statements of Mr. Hallinin and Ms. Martin at face value.

> Based upon all of Ms. Schlehuber's statements about what the EBC did and did not do in this matter, we conclude that plaintiff was denied a full and fair review of his severance claim because the EBC "wholly abdicated its responsibility to make even a cursory investigation into Plaintiff's claim, and thereby unreasonably concluded that Plaintiff's claim should be denied." (citation omitted)

(Appendix B, pp. 45a-48a). The District Court concluded that "the EBC completely abdicated its responsibilities in this case and in doing so, its decision on the initial claim was arbitrary and capricious." (Appendix B, p. 49a).

The District Court turned next to the EBC's review of Plaintiff's appeal, specifically, the EBC's actions of improperly "crediting the company process and witnesses," which was found to be an "improper and a complete dereliction of its duties under the Severance Plan and under ERISA." (Appendix B, p. 50a). The relevant portions of the District Court's findings are as follows:

> In its review of plaintiff's appeal of the initial denial of his claim for severance benefits, the EBC was presented with all the documents reviewed on the initial appeal together with the February 28, 2002 letter from Attorney Strokoff and responses to that letter by Mr. Hallinin and Ms. Martin.
>
> The EBC did not actually meet regarding plaintiff's appeal. Rather, they individually

> reviewed the documents and consented to issue a decision without a meeting.
>
> We note that Attorney Strokoff's letter provided additional information indicating conflict between the accounts of Mr. Hallinin and Ms. Martin and that of plaintiff. The plaintiff's averment that he never admitted falsifying any records of client calls is significant in this regard.
>
> Moreover, plaintiff pointed out to the EBC that there may be handwritten notes of the August 22, 2001 meeting which were not produced by the company. In addition, plaintiff alleged that both Mr. Hallinin and Ms. Martin acknowledged that they knew of plaintiff's prior grievance. Finally, plaintiff questioned how the EBC could come to its decision on his claim for severance benefits without conducting an investigation or holding a hearing to resolve the numerous factual differences.

(Appendix B, pp. 49a-50a).

The Third Circuit, who clearly did not understand this Court's holding in *Glenn*, simply looked at one factor, the conflict of interest, and ignored all other considerations, including those considered by the District Court. Although the Third Circuit acknowledged that *Glenn* required it to "take account of several different considerations of which a conflict of interest is one," (Appendix A, p. 8a), the Third Circuit simply disregarded this portion of *Glenn's* holding.

The Third Circuit stated that the only "factors" it considered in determining that the plan administrator's decision to deny Petitioner's decedent's benefits was not an abuse of discretion was whether Attorney Sommers acted under a conflict of interest:

> We disagree with the District Court and find that the EBC did not abuse its discretion when it denied Schwing's claim for severance benefits, even considering, **as factors**, the attorney's conflict of interest and the conflict of interest inherent in the fact that Lilly funds and administers the plan.

(Appendix A, pp. 8a-9a). Although the Third Circuit stated that "there was an abundance of evidence of Schwing's misconduct to support the denial of his claim," (Appendix A, p. 8a), the court failed to elaborate on exactly what "misconduct" it considered in reaching its decision.[2] This rather appalling job of

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[2] By reference, Petitioner incorporates Section II of this Petition as the Third Circuit usurped the District Court's function as the finder of fact. The District Court did not find that the Petitioner's decedent committed acts of misconduct as the Third Circuit found. Rather, the District Court made a finding to the contrary:

> We conclude that the EBC completely abdicated its responsibilities in this case and in doing so, its decision on the initial claim was arbitrary and capricious. Had the EBC done more than just simply credit the investigation and conclusions of the company in this matter, it may well have determined that plaintiff had not committed misconduct.

(Appendix B, p. 49a). Additionally, the District Court found Petitioner's decedent to be credible:

appellate review coupled with the misapplication of *Glenn* requires action by this Court.

II. THE THIRD CIRCUIT'S DISPOSITION OF PETITIONER'S CLAIMS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BY USURPING THE TRIAL JUDGE'S FUNCTION AS THE FINDER OF FACT

In order to find that Petitioner's ERISA claims failed as a matter of law, the Third Circuit disregarded testimonial evidence and substituted its own version of the facts for that of the District Court. This method used by the Third Circuit fundamentally conflicts with the consistent acknowledgement by this Court of the importance of the fact finder's ability to personally judge the credibility of witnesses before choosing to either accept or disregard their testimony. *Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 500-01 (1984). It is also contrary to this Court's admonition that courts of appeals are not to "decide factual issues *de novo*." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969).

> On the issue of whether Mr. Schwing admitted falsifying call reports, we find the trial testimony of Mr. Schwing credible that he never admitted to falsifying call reports.

(Appendix B, p. 25a, fn. 8). Once again, the Third Circuit ignored this Court's precedent and made findings of fact that are inappropriate on appellate review.

In its opinions, and in its adoption and construction of Rule 52(a) of the Federal Rules of Civil Procedure, this Court has consistently acknowledged that the trier of fact who has seen the witnesses and heard their testimony is peculiarly well situated to judge their credibility and thereby to either accept or reject their testimony. The language of Rule 52(a) itself requires appellate courts to give "due regard...to the opportunity of the trial court to judge the credibility of the witnesses," and forbids reversal unless the finding is "clearly erroneous." Fed. R. Civ. P. 52(a).

The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of fact, who is usually in a superior position to appraise and weigh the evidence. *Zenith Radio Corp.*, 395 U.S. at 123. The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether "on the entire evidence (it) is left with the definite and firm conviction that a mistake has been committed." *Id.* (citations omitted).

Giving effect to the recognition that findings of fact are best left to the tribunal that actually receives the evidence, this Court construed the "clearly erroneous" standard of review to be very exacting. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). The presumption that fact findings and credibility choices made by the trial court are correct is given even greater effect when the findings come, as here, after a complete trial on the merits. *Bose Corp.*, 466 U.S. at 500-01. This Court also recognized the value of the perspective of the trial judge who has personally viewed the testimony when weighing conflicting

evidence or making credibility choices. It quoted from *Boyd v. Boyd,* 252 N.Y. 422, 429 (1930) to observe that because of the exposure to living witnesses, "the original trier of the facts holds a position of advantage from which appellate judges are excluded.... To the sophistication and sagacity of the trial judge the law confides the duty of appraisal" *Id.*, *cited in, United States v. Oregon State Medical Society,* 343 U.S. 326, 339 (1952).

The Third Circuit's opinion makes clear that not only was the panel usurping the District Court's function to be the finder of fact, but in so doing, the substitution of the panel's version of the facts was done without a firm conviction that a mistake had actually been committed. More specifically, the Third Circuit made a factual determination that the "purported" conflict of interest surrounding Attorney Sommers was not serious. The Third Circuit stated:

> Even if we considered the purported conflict of interest here to be serious, the decision to deny Schwing's claim for severance benefits was not so close that this factor would act as "tiebreaker" tipping the scales in favor of finding that the EBC abused its discretion.

(Appendix A, p. 9a). The District Court, however, found otherwise and discussed the nature of her structural conflict:

> All of Attorney Sommers' actions were consistent with her role as in-house counsel for Lilly, not as counsel for the EBC and certainly not in the interests of Mr. Schwing. In addition, Attorney Sommers included in her presentation

> to the EBC a recommendation that Mr. Schwing's claim for severance benefits be denied. This was clearly against Mr. Schwing's interest.
>
> Finally, with regard to plaintiff's appeal of the original determination by the EBC to deny benefits, Attorney Sommers kept from the EBC certain documents sent by plaintiff after the February 28, 2002 deadline for submission of materials, but before the April 22, 2002 decision by the EBC to deny plaintiff's appeal. We conclude that this act was done to plaintiff's detriment.

(Appendix B, p. 43a). Additionally, the District Court found as a finding of fact that the EBC's denial of the severance claim was not made within the time required by the Severance Plan. (Appendix B, p. 35a). The Third Circuit failed to even acknowledge, let alone discuss this procedural irregularity, which the District Court clearly considered and found significant.

It is well-established that "[a]n appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court might give the facts another construction, resolve ambiguities differently, and find more a sinister cast to actions which [the] district court apparently deemed innocent." *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 845 (1982). The Third Circuit did just the opposite.[3]

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[3] Similar to this case, this Court in *Icicle Seafoods, Inc. v. Worthington*, 474 U.S. 709 (1986) vacated a Ninth Circuit opinion

Additionally, the Third circuit blatantly ignored the findings of factual and procedural irregularities that the District Court attributed to Attorney Sommers; i.e. (1) failing to provide the summaries and written

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after finding that the Ninth Circuit mistakenly engaged in fact-finding. In *Worthington*, employees sued their employer to recover overtime benefits under federal statute. 474 U.S. at 710. The district court determined the employees were excluded from overtime benefits because they were "Seamen," an excluded class under the statute. *Id.* at 710-11. Under the guise of *de novo* review, the Ninth Circuit reversed the district court, finding the employees were not seamen, "but instead industrial maintenance employees," an included class. *Id.* at 710, 712. Nowhere did the Ninth Circuit mention any of the factual findings of the district court, "much less discuss or analyze them." *Id.* at 713. In vacating, this Court stated "the Court of Appeals was mistaken to engage in such fact-finding." *Id.* at 714. This Court outlined the circuit court's options. It could remand to allow the district court to make additional factual findings; it could set aside the district court's findings under a clearly erroneous standard; or it could reverse the district court's application of the law to the facts. *Id.* at 714. The circuit court should not have made factual findings on its own. *Id.* at 714. Quoting *Anderson*, 470 U.S. at 574-75, this Court explained why courts of appeal are inappropriate arenas for findings of fact:

> The rationale for the original finder of fact is not limited to the superiority of the trial judge's opinion to make credible determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources.

Id. at 714. Here, as described above, the Third Circuit engaged in the same conduct the Supreme Court chastised the Ninth Circuit for in *Worthington*.

responses by Hallinin, Martin and Popa to Mr. Schwing or Attorney Strokoff prior to the EBC considering the claim for severance; (2) allowing information in Hallinin's "Employee Background" document that was not part of the decision to terminate Mr. Schwing to be presented to the EBC for no other purpose than to hold Mr. Schwing in a bad light; (3) including in her presentation to the EBC a recommendation that the severance claim be denied; and (4) keeping several documents that were submitted on Mr. Schwing's behalf from being submitted to the EBC despite the fact that they were submitted beyond the February 28, 2002, deadline, but before the April 22, 2002, decision by the EBC to deny the appeal, while allowing information from Lilly submitted after February 28, 2002, to be presented to the EBC. (Appendix B, pp. 31a-36a, 42a-43a). Nowhere in their opinion did the Third Circuit even mention any of these factual findings.

Finally, nowhere in the Third Circuit's opinion is the actual evidentiary record assessed. Moreover, nowhere in the Third Circuit's opinion does the panel conclude "on the entire evidence (they) are left with the definite and firm conviction that a mistake has been committed." *Anderson*, 470 U.S. at 575. At best, the Third Circuit's opinion is a classic example of an appellate court simply disagreeing with the factual findings reached by the trial court and replacing them with factual findings of their own.

III. APPELLATE RESOLUTION OF FACT DISPUTES AND CREDIBILITY DETERMINATIONS VIOLATES THE DUE PROCESS GUARANTEES IN THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

When an appellate court substitutes its own version of the facts for that of the District Court, and makes credibility determinations that permit it to make a no evidence finding in support of a judgment on issues the trial court did not consider, those rulings are essentially unreviewable. The losing party's only recourse of right is a motion for rehearing before the same panel. A party may also make a suggestion for rehearing en banc, but that review is a matter of discretion, not of right. Fed. R. App. P. 40. A litigant like Petitioner has a right to petition to this Court for certiorari review of the court of appeals decision, but no right to this Court's review because this Court does not and should not concern itself with review of factual error in specific cases.

Thus, when a court of appeals takes on the task of a trial court and addresses fact issues the district court did not address, there is no realistic avenue by which the losing litigant can seek review of those findings or resulting judgments. There is no effective mechanism by which error can be remedied and there is no process by which arbitrary and capricious appellate rulings can be corrected. That lack of recourse denies litigants the procedural due process guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

A. The Statutory Right To Appellate Review Involves Due Process Considerations

Article III Section I of the Constitution grants Congress the power to create courts inferior to this Court. In 28 U.S.C. §§ 41, 43, Congress created the courts of appeals and gave them jurisdiction over appeals taken from district courts in the respective federal districts in 28 U.S.C. §§ 1291, 1294. By creating the courts of appeals and vesting in them jurisdiction over all appeals taken from reviewable decisions of the district courts, Congress created and vested in federal litigants a right to appellate review of adverse decisions. While the appellate review of fact findings by district courts is limited by Fed. R. Civ. P. 52(a), it is nonetheless available to litigants who believe that the district court incorrectly weighed or evaluated the evidence it received during the trial. That statutorily created right is cognizable as an interest protected by the due process guarantees contained in the Fifth and Fourteenth Amendments.

While not constitutionally based, *Deposit Guaranty National Bank v. Roper,* 445 U.S. 326, 333-34 (1980), the right to appeal that Congress created is guaranteed by constitutional notions of due process to preserve a "substantial right to redress by some effective procedure." *Gibbes v. Zimmerman,* 290 U.S. 326, 332 (1933). The lack of any real opportunity to seek appellate review of erroneous original appellate resolution of fact disputes deprives litigants of the right to an effective procedure to seek redress that the Constitution guarantees. In short, once Congress has created the right to appeal it must be effective and available to all litigants, equally and fairly. *Lindsey v. Normet,* 405 U.S. 56, 77 (1972). It cannot be

constitutionally withheld from parties to cases where the trial court makes findings of fact that an appellate court disregards, while at the same time, substituting its own version of the facts for that of the District Court.

B. Original Appellate Fact Finding Deprives Litigants of Their Right To Appeal Without Due Process

This Court has repeatedly held that the essence of due process, as it relates to the administration of justice, is "the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976), quoting from, *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965). *See also Walters v. National Association of Radiation Survivors,* 473 U.S. 305, 321 (1985); *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 433 (1982).

A motion for panel rehearing is not a meaningful opportunity for review for due process purposes because the essence of appellate review involves an objective look at the merits of a judgment by a tribunal not involved in the initial rendition of that judgment. An opportunity to seek a rehearing by the same tribunal that found the facts and rendered the judgment initially simply cannot satisfy the right to appellate review that Congress created. Otherwise the availability of motions for new trial or motions to correct, modify, or reform the judgment would have permitted Congress to avoid creating the Federal Circuit courts at all.

Neither is the opportunity to seek rehearing by the circuit sitting en banc a constitutionally or statutorily

satisfactory protection of that right. A rehearing en banc is a matter of discretion, not of right. *See* Fed. R. App. P. 35(a), (f) (establishing discretionary nature of petition for en banc determination). Thus, rehearing en banc is a more theoretical than real possibility and, because it is discretionary, it is certainly not the opportunity to be meaningfully heard that this Court described in *Mathews*, 424 U.S. at 333.

C. Original Appellate Fact Finding Deprives Litigants of Their Right To Be Heard At All

The essence of due process protection is the right to be heard in some meaningful manner. *Logan*, 455 U.S. at 433. Litigants rely on a district court's decision when framing their appellate arguments on the trial court's dispositive issues. Appellate fact issue resolution violates due process because it deprives litigants of the opportunity to be heard on those findings, made non-essential by the findings of the trial court.

Any litigant against whom a court of appeals renders judgment that requires resolution of fact issues not addressed by the trial court is potentially exposed to constitutional injury. Such litigants would be required, in that circumstance, to ask the district court to make findings and conclusions on alternate issues, which the courts may not be inclined to do, or face the possibility of an adverse judgment from which appellate review is impossible. Alternatively, litigants will be required to clutter the appellate record with argument and fact analysis not material to the issue the trial court did rule upon, for the sole purpose of ensuring a full hearing on those issues, without knowing whether such an effort is even necessary.

In sum, when appellate litigants reasonably rely on the trial court's analysis of a case when framing their arguments on appeal, they are deprived of the right to be heard on issues not resolved by the trial court, when those issues are addressed for the first time or given different interpretation by the court of appeals. That circumstance deprives litigants of their due process rights, and this Court should definitively address the issue.

As described in Section II above, the District Court made certain findings of fact that the Third Circuit chose to ignore, while at the same time substituting its own version of the facts. Petitioner reasonably relied on the findings of the District Court in framing its argument on appeal. By addressing factual issues for the first time on appeal that were not part of Petitioner's argument, the Third Circuit violated Petitioner's due process rights.

IV. THE THIRD CIRCUIT PERPETUATED A MANIFEST INJUSTICE BY APPLYING *GLENN* TO THE FACTS OF THIS CASE RATHER THAN THE LAW IN EFFECT AT THE TIME THE DISTRICT COURT RENDERED ITS DECISION

Prior to this Court's decision in *Metropolitan Life Insurance Co. v. Glenn*, 128 S.Ct. 2343 (2008), the Third Circuit "interpreted *Firestone* [*Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989)] to mean that courts should consider conflicts of interest affecting plan administration when formulating the standard of review." (Appendix A, p. 6a). Accordingly, "the Third Circuit adjusted the standard of review using a 'sliding scale' in which the level of deference accorded to a plan

administrator would change depending on the conflict or conflicts of interest affecting plan administration." (Appendix A, p. 6a). In determining whether to apply a heightened standard of review, the District Court correctly "consider[ed] evidence of potential bias and conflicts of interest." (Appendix B, p. 39a).

In *Glenn*, this Court "interpreted the relevant language in *Firestone* in a different way, holding that courts should continue to apply a deferential abuse-of-discretion standard of review in cases where a conflict of interest is present, but that courts should take the conflict into account not in formulating the standard of review, but in determining whether the administrator or fiduciary abused its discretion." (Appendix A, p. 6a).

As a result, the Third Circuit abandoned the "sliding scale" approach. (Appendix A, p. 7a). Instead, "courts reviewing the decisions of ERISA plan administrators or fiduciaries...should apply a deferential abuse of discretion standard of review across the board and consider any conflict of interest as one of several factors in considering whether the plan administrator or the fiduciary abused its discretion." (Appendix A, p. 7a).

This Court has held that a court is to "apply the law in effect at the time it renders its decision, unless doing so would result in a manifest injustice." *Bradley v. Richmond Sch. Bd.*, 416 U.S. 696, 711 (1974). Although the precise category of cases to which this exception applies has not been clearly delineated, this Court in *Bradley* expoused three factors a court is to consider in determining whether retroactive application will cause a manifest injustice: (1) the nature and identity of the parties; (2) the nature of

their rights; and (3) the nature of the impact of the change in the law upon those rights. *Id.* at 717.

Here, there is no question that retroactive application caused a manifest injustice. At the time Petitioner's decedent's case went to trial, *Glenn* had not been decided. Petitioner's decedent focused primarily on the plan administrator's conflict of interest, as the law at the time required. Petitioner's decedent did not know, nor could have foreseen, that *Glenn* would require courts to give equal weight to the plan administrator's conflict of interest when evaluating all factors the court deems important in determining whether the plan administrator abused its discretion.

Because a conflict of interest was accorded significant weight prior to *Glenn*, Petitioner's decedent's trial strategy was geared towards emphasizing that factor. Given the state of the law as of March 2005 when Petitioner's decedent's case was tried, less emphasis was directed towards the other factors which *Glenn* has now made equally as important as a conflict of interest. This manifest injustice is compounded because should certiorari be granted and this case be remanded, Petitioner's decedent is no longer available to testify on other facts the court could consider on the abuse of discretion analysis, as he died on October 12, 2007. Once again, the Third Circuit ignored this Court's decision in *Bradley* and applied *Glenn* retroactivity, when in fact, it should have remanded the case back to the District Court for a new trial in light of *Glenn*.

CONCLUSION

For all of the above reasons, Petitioner, Estate of Kevin Schwing, respectfully requests that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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Dated: November 23, 2010

APPENDIX

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APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-4671

[Filed April 14, 2009]

ESTATE OF KEVIN SCHWING	)
	)
v.	)
	)
THE LILLY HEALTH PLAN; THE ELI LILLY AND COMPANY LIFE INSURANCE AND DEATH BENEFIT PLAN; THE ELI LILLY AND COMPANY HEALTH CARE FLEXIBLE SPENDING PLAN; THE ELI LILLY AND COMPANY DEPENDENT DAY CARE FLEXIBLE SPENDING PLAN; THE LILLY SEVERANCE PAY PLAN; THE ELI LILLY AND COMPANY HOLIDAY AND VACATION PLAN; THE LILLY DENTAL PLUS PLAN; PCS PHARMACY BENEFITS MANAGEMENT SERVICE PROGRAM; THE LILLY EMPLOYEE SAVINGS PLAN; THE LILLY RETIREMENT PLAN; ELI LILLY AND COMPANY, INDIVIDUALLY AND AS PLAN SPONSOR, FIDUCIARY AND ADMINISTRATOR OF THE LILLY RETIREMENT PLAN, AND THE LILLY	)

SEVERANCE PAY PLAN, AND THE ELI LILLY AND COMPANY HOLIDAY AND VACATION PLAN, AND THE LILLY HEALTH PLAN, AND THE LILLY DENTAL PLUS PLAN, AND PCS PHARMACY BENEFITS MANAGEMENT SERVICE PROGRAM; THE EMPLOYEE BENEFITS COMMITTEE, AS ADMINISTRATOR AND NAMED FIDUCIARY OF THE LILLY RETIREMENT PLAN, AND THE LILLY SEVERANCE PAY PLAN, AND THE ELI LILLY AND COMPANY HOLIDAY AND VACATION PLAN, AND THE LILLY HEALTH PLAN, AND THE LILLY DENTAL PLUS PLAN, AND PCS PHARMACY BENEFITS MANAGEMENT SERVICE PROGRAM; LILLY GLOBAL SHARES STOCK OPTION PLAN,

Appellants

(AMENDED AS PER THE CLERK'S 6/19/08 ORDER)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 03-cv-04848)
District Judge: The Honorable James Knoll Gardner

Argued: March 5, 2009

Before: BARRY, GREENBERG, Circuit Judges, and ACKERMAN,* District Judge

(Opinion Filed: April 14, 2009)

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OPINION OF THE COURT

BARRY, Circuit Judge

The Lilly Health Plan appeals the order of the District Court entering judgment on behalf of a claimant who sought severance benefits pursuant to

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* Honorable Harold A. Ackerman, Senior United States District Judge for the District of New Jersey, sitting by designation.

an ERISA-governed plan. Applying the recent decision of the Supreme Court in *Metropolitan Life Insurance Co. v. Glenn*, 128 S.Ct. 2343 (2008), we conclude that the plan administrator's decision to deny benefits was not an abuse of discretion. We will, therefore, reverse the order of the District Court.

I.

Kevin Schwing, an employee of Eli Lilly and Company ("Lilly"), was terminated from his sales position on August 22, 2001 for falsifying call data. Schwing sought payment of severance benefits pursuant to the Lilly Severance Plan[1], but his claim for benefits was denied by Lilly's Employee Benefits Committee ("EBC"), the plan administrator. The EBC determined that Schwing was ineligible for severance benefits because he was terminated for misconduct, misconduct to which both Schwing's supervisor and a representative from Lilly's human resources department stated to the EBC that Schwing had admitted. Schwing challenged the EBC's determination, denying that he had admitted any wrongdoing and arguing that he had been terminated not for the alleged misconduct, but either as a result of mistakes or in retaliation for a grievance he filed in 1997. The EBC considered Schwing's arguments, and again denied his claim.

---

[1] The Lilly Severance Plan is an ERISA-governed, self-funded plan that grants the plan administrator full discretion to interpret the terms of the plan and to decide any and all matters arising from the plan.

Following a bench trial, the District Court entered judgment for Schwing, finding that the EBC's decision was tainted by a conflict of interest and that the EBC failed to adequately investigate Schwing's claim. Lilly now appeals.

Our review of the District Court's legal conclusions is plenary, and we apply the same standard of review that the Court should have applied. *Smathers v. Multi-Tool, Inc. / Multi-Plastics, Inc., Employee Health and Welfare Plan*, 298 F.3d 191, 194 (3d Cir. 2002). Because determining the correct standard of review is a question of law, our review is plenary. We review the Court's findings of fact for clear error. *Kosiba v. Merck & Co.*, 384 F.3d 58, 64 (3d Cir. 2004). The District Court had jurisdiction pursuant to 29 U.S.C. § 1132(e)(1), and we have jurisdiction pursuant to 28 U.S.C. § 1291.

II.

In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), the Supreme Court held that, when evaluating challenges to denials of benefits in actions brought under 29 U.S.C. § 1132(a)(1)(B), district courts are to review the plan administrator's decision under a de novo standard of review, unless the plan grants discretionary authority to the administrator or fiduciary to determine eligibility for benefits or interpret the terms of the plan. The Court recognized that "if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a factor in determining whether there is an abuse of discretion." *Firestone*, 489 U.S. at 115 (internal quotation omitted).

Prior to the Supreme Court's recent decision in *Glenn*, we interpreted this language in Firestone to mean that courts should consider conflicts of interest affecting plan administration when formulating the standard of review. *See Pinto v. Reliance Standard Life Ins. Co.*, 214 F.3d 377, 392 (3d Cir. 2000). Accordingly, we adjusted the standard of review using a "sliding scale" in which the level of deference we accorded to a plan administrator would change depending on the conflict or conflicts of interest affecting plan administration. *Id.*

In *Glenn*, the Supreme Court interpreted the relevant language in *Firestone* in a different way, holding that courts should continue to apply a deferential abuse-of-discretion standard of review in cases where a conflict of interest is present, but that courts should take the conflict into account not in formulating the standard of review, but in determining whether the administrator or fiduciary abused its discretion:

> We do not believe that *Firestone*'s statement implies a change in the *standard* of review, say, from deferential to *de novo* review. Trust law continues to apply a deferential standard of review to the discretionary decisionmaking of a conflicted trustee, while at the same time requiring the reviewing judge to take account of the conflict when determining whether the trustee, substantively or procedurally, has abused his discretion. We see no reason to forsake *Firestone*'s reliance upon trust law in this respect.

Glenn, 128 S.Ct. at 2350 (emphasis in original) (internal citations omitted). The Court held that it was not "necessary or desirable" for courts to create special procedural, evidentiary, or burden-of-proof rules to account for conflicts of interest, and that "conflicts are but one factor among many that a reviewing judge must take into account." *Id.* at 2351.

Accordingly, we find that, in light of *Glenn*, our "sliding scale" approach is no longer valid. Instead, courts reviewing the decisions of ERISA plan administrators or fiduciaries in civil enforcement actions brought pursuant to 29 U.S.C. § 1132(a)(1)(B) should apply a deferential abuse of discretion standard of review across the board and consider any conflict of interest as one of several factors in considering whether the administrator or the fiduciary abused its discretion. *Glenn*, 128 S.Ct. at 2350; *see Champion v. Black & Decker (U.S.) Inc.*, 550 F.3d 353, 359 (4th Cir. 2008) (abandoning sliding scale approach, after *Glenn*); *Burke v. Pitney Bowes Inc. Long-Term Disability Plan*, 544 F.3d 1016, 1025 (9th Cir. 2008) (same); *Doyle v. Liberty Life Assur. Co. of Boston*, 542 F.3d 1352, 1357 (11th Cir. 2008) (same); *Wakkinen v. UNUM Life Ins. Co. of Am.*, 531 F.3d 575, 581 (8th Cir. 2008) (same); *see also Michaels v. The Equitable Life Assur. Soc. of U.S. Employees, Managers, and Agents Long Term Disability Plan*, 2009 WL 19344 (3d Cir. Jan. 5, 2009) (predicting the result we now reach: that, after *Glenn*, we will no longer apply the sliding-scale approach). *But see Weber v. GE Group Life Assur. Co.*, 541 F.3d 1002, 1010-11 (10th Cir. 2008) (holding that the sliding scale approach mirrors *Glenn*'s approach).

As *Glenn* recognized, benefits determinations arise in many different contexts and circumstances, and,

therefore, the factors to be considered will be varied and case-specific. *Glenn*, 128 S.Ct. at 2351. In *Glenn*, factors included procedural concerns about the administrator's decision making process and structural concerns about the conflict of interest inherent in the way the ERISA-governed plan was funded; in another case, the facts may present an entirely different set of considerations. Id. at 2351-52. After *Glenn*, however, it is clear that courts should "take account of several different considerations of which a conflict of interest is one," and reach a result by weighing all of those considerations. *Id.* at 2351.

III.

Here, and in broad summary, the District Court applied a heightened standard of review based on its finding of a conflict of interest involving the EBC's attorney, who was also an attorney for Lilly. The Court concluded that the conflict of interest tainted the deliberations to such a degree as to render the EBC's decision arbitrary and capricious. In the alternative, the Court concluded that, even ignoring the conflict of interest, the EBC's decision was arbitrary and capricious largely because the EBC failed to undertake a full investigation of Schwing's claim.

We disagree with the District Court and find that the EBC did not abuse its discretion[2] when it denied

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[2] Our prior caselaw referenced an "arbitrary and capricious" standard of review, while *Glenn* describes the standard as "abuse of discretion." We have recognized that, at least in the ERISA context, these standards of review are practically identical. *Abnathya v. Hoffman-La Roche, Inc.*, 2 F.3d 40, 45 n.4 (3d Cir. 1993)

Schwing's claim for severance benefits, even considering, as factors, the attorney's conflict of interest and the conflict of interest inherent in the fact that Lilly funds and administers the plan. The attorney's role vis-a-vis the EBC was advisory only and her conduct, although criticized by the Court, was altogether appropriate. We note that ERISA fiduciaries are not required to engage independent counsel to aid in their interpretation and administration of an ERISA plan, *Ashenbaugh v. Crucible Inc., 1975 Salaried Retirement Plan*, 854 F.2d 1516, 1531-32 (3d Cir. 1988), and we note our disagreement with the Court's conclusion, based on certain cases interpreting the attorney-client privilege, *see, e.g., Washington-Baltimore Newspaper Guild v. Washington Star Co.*, 543 F.Supp. 906 (D.D.C. 1982), that an attorney for an ERISA fiduciary owes a fiduciary-like duty of neutrality to each ERISA claimant. Even if we considered the purported conflict of interest here to be serious, the decision to deny Schwing's claim for severance benefits was not so close that this factor would act as "tiebreaker" tipping the scales in favor of finding that the EBC abused its discretion. *See Glenn*, 128 S.Ct. at 2351; *Wakkinen v. UNUM Life Ins. Co. of Am.*, 531 F.3d 575, 582 (8th Cir. 2008). To the contrary, there was an abundance of evidence of Schwing's misconduct to support the denial of his claim and a lack of evidence to support his theory of pretext.

We also conclude, as a matter of law, that the EBC conducted an appropriate investigation of the claim. There is no requirement that an ERISA administrator faced with an issue of who is to be believed must conduct an independent investigation into the veracity of each account. *Pinto*, 214 F.3d at 394 n.8; *see also*

Cord v. Reliance Standard Life Ins. Co., 362 F. Supp. 2d 480, 486 (D. Del. 2005). The administrative record before the District Court was more than adequate to support the EBC's denial of Schwing's claim, and we cannot conclude that the EBC's decision was "without reason, unsupported by substantial evidence or erroneous as a matter of law." *Abnathya*, 2 F.3d at 45 (internal quotation omitted).

IV.

For the reasons stated above, we will reverse the judgment of the District Court.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-4671

[Filed April 14, 2009]

ESTATE OF KEVIN SCHWING	)
	)
v.	)
	)
THE LILLY HEALTH PLAN; THE ELI LILLY AND COMPANY LIFE INSURANCE AND DEATH BENEFIT PLAN; THE ELI LILLY AND COMPANY HEALTH CARE FLEXIBLE SPENDING PLAN; THE ELI LILLY AND COMPANY DEPENDENT DAY CARE FLEXIBLE SPENDING PLAN; THE LILLY SEVERANCE PAY PLAN; THE ELI LILLY AND COMPANY HOLIDAY AND VACATION PLAN; THE LILLY DENTAL PLUS PLAN; PCS PHARMACY BENEFITS MANAGEMENT SERVICE PROGRAM; THE LILLY EMPLOYEE SAVINGS PLAN; THE LILLY RETIREMENT PLAN; ELI LILLY AND COMPANY, INDIVIDUALLY AND AS PLAN SPONSOR, FIDUCIARY AND ADMINISTRATOR OF THE LILLY RETIREMENT PLAN, AND THE LILLY SEVERANCE PAY PLAN, AND THE ELI LILLY AND COMPANY HOLIDAY AND VACATION PLAN, AND THE LILLY HEALTH PLAN, AND THE LILLY DENTAL PLUS PLAN, AND PCS PHARMACY BENEFITS MANAGEMENT SERVICE PROGRAM; THE EMPLOYEE BENEFITS COMMITTEE, AS	)

ADMINISTRATOR AND NAMED FIDUCIARY)
OF THE LILLY RETIREMENT PLAN, AND)
THE LILLY SEVERANCE PAY PLAN, AND)
THE ELI LILLY AND COMPANY HOLIDAY)
AND VACATION PLAN, AND THE LILLY)
HEALTH PLAN, AND THE LILLY DENTAL)
PLUS PLAN, AND PCS PHARMACY)
BENEFITS MANAGEMENT SERVICE)
PROGRAM; LILLY GLOBAL SHARES STOCK)
OPTION PLAN,)
)
Appellants)

(AMENDED AS PER THE CLERK'S
6/19/08 ORDER)

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT
OF PENNSYLVANIA
(D.C. Civil No. 03-cv-04848)
District Judge: The Honorable James Knoll Gardner

Argued: March 5, 2009

Before: BARRY, GREENBERG, Circuit Judges, and
ACKERMAN,* District Judge

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* Honorable Harold A. Ackerman, Senior United States District Judge for the District of New Jersey, sitting by designation.

JUDGMENT

This cause came to be heard on appeal from the United States District Court for the Eastern District of Pennsylvania and was argued on March 5, 2009.

After consideration of all the contentions raised, it is

ADJUDGED and ORDERED that the judgment of the District Court be and hereby is reversed. All in accordance with the Opinion of the Court.

ATTEST:

/s/ Marcia M. Waldron
Marcia M. Waldron, Clerk

Dated: April 14, 2009

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 03-CV-04848

[Filed September 29, 2006]

KEVIN SCHWING,

Plaintiff

vs.

THE ELI LILLY AND COMPANY HEALTH CARE FLEXIBLE SPENDING PLAN; THE LILLY SEVERANCE PAY PLAN; THE ELI LILLY AND COMPANY HOLIDAY AND VACATION PLAN; ELI LILLY AND COMPANY, Individually and as Plan Sponsor, Fiduciary and Administrator of The Lilly Retirement Plan, and The Lilly Severance Pay Plan, and The Eli Lilly and Company Holiday and Vacation Plan, and The Lilly Health Plan, and The Lilly DentalPlus Plan, and PCS Pharmacy Benefits Management Service Program; THE EMPLOYEE BENEFITS COMMITTEE, As Administrator and Named Fiduciary of The Lilly Retirement Plan, and The Lilly Severance Pay Plan, and The Eli Lilly and Company Holiday and Vacation Plan, and The Lilly Health Plan, and The Lilly

DentalPlus Plan, and PCS Pharmacy Benefits Management Service Program; and LILLY GLOBAL SHARES STOCK OPTION PLAN,

Defendants

VERDICT

NOW, this 29th day of September, 2006, upon consideration of the non-jury trial held March 1, 2, 3, 4, 7 and 8, 2005 and November 22, 2005; after closing arguments; upon consideration of the testimony and evidence adduced at trial; upon consideration of the pleadings and record papers; upon consideration of the parties' post-trial submissions; and for the reasons expressed in the accompanying Adjudication, including Findings of Fact, Conclusions of Law, and Discussion:

We find in favor of plaintiff Kevin Schwing and against defendants Eli Lilly and Company, The Lilly Severance Pay Plan and The Employee Benefits Committee in the amount of $102,130 on plaintiff's claim under the severance pay plan.

We find in favor of defendants Eli Lilly and Company, The Eli Lilly and Company Holiday and Vacation Plan and The Employee Benefits Committee and against plaintiff Kevin Schwing on plaintiff's claim for vacation benefits.

We find in favor of defendants Eli Lilly and Company, The Eli Lilly and Company Health Care Flexible Spending Plan and The Employee Benefits Committee and against plaintiff Kevin Schwing on plaintiff's claim for medical benefits.

We find in favor of defendants Eli Lilly and Company, the Lilly Global Shares Stock Option Plan and The Employee Benefits Committee and against plaintiff Kevin Schwing on plaintiff's claim for stock options.

Finally, we find in favor of defendant Eli Lilly and Company and against plaintiff Kevin Schwing on plaintiff's claim for reimbursement of his final expenses.

IT IS FURTHER ORDERED that judgment is granted in favor of plaintiff Kevin Schwing and against defendants Eli Lilly and Company, The Lilly Severance Pay Plan and The Employee Benefits Committee in the amount of $102,130 on plaintiff's claim under the severance pay plan.

IT IS FURTHER ORDERED that judgment is granted in favor of defendants and against plaintiff Kevin Schwing on all remaining claims.

IT IS FURTHER ORDERED that the Clerk of Court shall enter judgment in favor of plaintiff Kevin Schwing against defendant Eli Lilly and Company in the amount of $102,130.[1]

IT IS FURTHER ORDERED that the parties shall have until on or before November 15, 2006 to file a

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[1] It is the sense of this Order that because The Lilly Severance Pay Plan is unfunded and the payment of any severance benefit is ultimately the responsibility of defendant Eli Lilly and Company, we have directed the Clerk of Court to enter judgment only against Eli Lilly and Company.

petition for counsel fees pursuant to 29 U.S.C. § 1132(g).

IT IS FURTHER ORDERED that the Clerk of Court shall mark this matter closed for statistical purposes.

BY THE COURT:

/s/ JAMES KNOLL GARDNER
James Knoll Gardner
United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA**

Civil Action No. 03-CV-04848

[Filed September 29, 2006]

KEVIN SCHWING,

Plaintiff

vs.

THE ELI LILLY AND COMPANY HEALTH CARE FLEXIBLE SPENDING PLAN; THE LILLY SEVERANCE PAY PLAN; THE ELI LILLY AND COMPANY HOLIDAY AND VACATION PLAN; ELI LILLY AND COMPANY, Individually and as Plan Sponsor, Fiduciary and Administrator of The Lilly Retirement Plan, and The Lilly Severance Pay Plan, and The Eli Lilly and Company Holiday and Vacation Plan, and The Lilly Health Plan, and The Lilly DentalPlus Plan, and PCS Pharmacy Benefits Management Service Program; THE EMPLOYEE BENEFITS COMMITTEE, As Administrator and Named Fiduciary of The Lilly Retirement Plan, and The Lilly Severance Pay Plan, and The Eli Lilly and Company Holiday and Vacation Plan, and The Lilly Health Plan, and The Lilly DentalPlus Plan, and PCS Pharmacy Benefits Management Service Program; and LILLY

GLOBAL SHARES STOCK OPTION PLAN,)
)
Defendants)
)

* * *

APPEARANCES:

JOSEPH M. TODDY, ESQUIRE
MICHAEL S. MISHER, ESQUIRE
On behalf of Plaintiff

ELLEN E. BOSHKOFF, ESQUIRE
On behalf of Defendant

* * *

ADJUDICATION

JAMES KNOLL GARDNER,
United States District Judge

This matter is before the court after non-jury trial held March 1, 2, 3, 4, 7 and 8, 2005. Closing arguments were conducted on November 22, 2005. Defendants' Post-Trial Brief was filed February 17, 2006. On February 27, 2006 Plaintiff, Kevin Schwing's Post-trial Brief was filed.

The issues before the court include plaintiff's entitlement to benefits pursuant to the Employee Retirement Income Security Act of 1974, ("ERISA")[1]

[1] 29 U.S.C. §§ 1001-1461.

under The Lilly Severance Pay Plan, The Eli Lilly and Company Holiday and Vacation Plan, The Eli Lilly and Company Health Care Flexible Spending Plan, the Lilly Global Shares Stock Option Plan and a pendent state law claim for breach of contract regarding plaintiff's final expense report.

At trial, three witnesses testified. Plaintiff Kevin Schwing testified on his own behalf. In addition, plaintiff called as of cross-examination Sandra J. Sommers, Esquire, in-house counsel for defendant Eli Lilly and Company. Defendants called Lisa Ann Schlehuber, Chief Executive Officer of the Eli Lilly Federal Credit Union.[2] Plaintiff introduced 32 exhibits and defendant introduced 4 exhibits into evidence at trial.[3]

We find in favor of plaintiff Kevin Schwing and against defendants Eli Lilly and Company, The Lilly Severance Pay Plan and The Employee Benefits

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[2] Ms. Schlehuber testified that in her previous position as Director of Global Compensation and Benefits for Eli Lilly and Company, she was a member of the defendant Employee Benefits Committee.

[3] In addition to the exhibits offered at trial, the parties jointly offered portions of certain depositions and the pertinent exhibits referenced in those depositions. Specifically, the parties offered portions of the June 16, 2004 deposition of plaintiff Kevin Schwing; the June 24, 2004 and August 4, 2004 depositions of Lisa A. Schlehuber; the August 5, 2004 and October 15, 2004 depositions of Sandra J. Sommers, Esquire; the September 13, 2004 deposition of Jeffrey Hallinin (plaintiff's former supervisor); and the August 3, 2004 deposition of Valerie Martin (the Human Resources Department Representative present at plaintiff's termination).

Committee in the amount of $102,130 on plaintiff's claim under the severance pay plan.

We find in favor of defendants Eli Lilly and Company, The Eli Lilly and Company Holiday and Vacation Plan and The Employee Benefits Committee and against plaintiff Kevin Schwing on plaintiff's claim for vacation benefits.

We find in favor of defendants Eli Lilly and Company, The Eli Lilly and Company Health Care Flexible Spending Plan and The Employee Benefits Committee and against plaintiff Kevin Schwing on plaintiff's claim for medical benefits.[4]

We find in favor of defendants Eli Lilly and Company, the Lilly Global Shares Stock Option Plan and The Employee Benefits Committee and against plaintiff Kevin Schwing on plaintiff's claim for stock options.[5]

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[4] On March 2, 2005 during the second day of trial, plaintiff withdrew his claim for benefits under The Eli Lilly and Company Health Care Flexible Spending Plan. See Notes of Testimony of the non-jury trial held before the undersigned ("N.T.") on March 2, 2005 at page 114.

[5] On Page 12 of Plaintiff's Answer to Defendants' Memorandum of Law in Support of Defendants' Motion for Summary Judgment filed December 15, 2004, plaintiff stated: "Plaintiff has no objection to the dismissal of the claim for stock options in Count IV of the Complaint." Plaintiff's reference to Count IV of plaintiff's Complaint was incorrect because the claim for stock options was contained in Count VI. However, based upon plaintiff's statement, we grant judgment in favor of defendants and against plaintiff on the claim for stock options.

Finally, we find in favor of defendant Eli Lilly and Company and against plaintiff Kevin Schwing on plaintiff's claim for reimbursement of his final expenses.

FINDINGS OF FACT

Based upon the testimony and evidence adduced at trial,[6] the stipulations of the parties, the agreements of counsel, the pleadings, record papers and the parties' post-trial submissions, we make the following Findings of Fact.

Plaintiff's Employment

1. Plaintiff Kevin Schwing ("Schwing") worked for defendant The Eli Lilly and Company ("Lilly") from July 4, 1980 until his discharge on August 22, 2001.

2. Beginning in 1991, Schwing was employed by Lilly as a retail sales representative for their pharmaceutical products.

3. On January 1, 2001, Jeffrey Hallinin ("Hallinin") took over as the Harrisburg District Sales Manager, and was Schwing's immediate supervisor.

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[6] Our Findings of Fact reflect our credibility determinations regarding the testimony and evidence presented at trial. Credibility determinations are within the sole province of the finder of fact, in this case the court. Fed.R.Civ.P. 52; See, e.g. Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 715, 106 S.Ct. 1527, 1530, 89 L.Ed.2d 739, 745 (1986). Implicit in our findings is the conclusion that we found the testimony of witnesses credible in part, and have rejected portions of each of their testimony as more fully explained in our discussion.

4. At the time of his discharge, Schwing was a retail sales representative in the Sigma/Neuroscience ("Sigma") sales division and reported to Hallinin.

August 22, 2001 Meeting

5. On August 21, 2001 Hallinin requested Schwing to attend a meeting the next day, August 22, 2001, at the Four Points Sheraton hotel, in Harrisburg, Pennsylvania.

6. Prior to the August 22, 2001 meeting, Hallinin discussed his concerns about plaintiff's call reporting and performance with Hallinin's supervisor Valerie Hobson and Valerie Martin ("Martin"), a representative of the Human Resources Department.

7. Martin contacted numerous persons and departments prior to the August 22, 2001 meeting. These included the legal department, the EEOC compliance department and upper management including Val Hobson, the Sales Director.

8. Prior to the August 22, 2001 meeting a script was prepared by Martin and Hallinin to direct the conversation with Schwing. One section of the script included a statement that Schwing was terminated.[7]

9. When Hallinin asked Schwing to attend the August 22, 2001 meeting, he did not inform Schwing what the substance of the meeting would be.

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[7] Plaintiff's Exhibit 4.

10. On August 22, 2001 Hallinin and Martin met with Schwing.

11. During the August 22, 2001 meeting, Hallinin and Martin confronted Schwing about sales call data for a six-month period from January 2001 through June 2001.

12. Schwing was specifically confronted with sales call data regarding two medical group practices, Good Hope Family Practice and Middletown Family Practice.

13. Schwing denied intentionally fabricating sales call data.

14. At the meeting and in support of his allegations against Schwing, Hallinin stated that he called the two practices and inquired if certain doctors were "on the schedule" on certain days. Hallinin was advised that some of the doctors that Schwing reported meeting with were not on the schedule on those days.

15. During the meeting, Schwing asked Hallinin to call back Good Hope Family Practice and Middletown Family Practice and ask if the doctors were in the office on the days he reported meeting with them, rather than if they were on the schedule that day.

16. Hallinin refused to call back Good Hope Family Practice and Middletown Family Practice. Hallinin claims that Schwing admitted falsifying the

call reports regarding these practices and that is the reason he did not call back these two practices.[8]

17. During the meeting, Martin took three pages of handwritten notes that were subsequently destroyed. Martin used the original handwritten notes to create a second version of the notes.

18. At the conclusion of the August 22, 2001 meeting, Schwing's employment was terminated by Lilly. The stated reason for the termination was misconduct by falsifying call reports.

19. Plaintiff's computer, vehicle, product samples and certain written materials were returned to Lilly by plaintiff the same day as his termination.

20. Lilly did not have any policy that would permit plaintiff to appeal his termination.

Employee Benefits Committee

21. Lilly sponsors numerous employee benefit plans. The plans relevant to this matter include The Eli Lilly and Company Holiday and Vacation Plan ("Vacation Plan") and The Lilly Severance Pay Plan ("Severance Plan").[9]

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[8] On the issue of whether Mr. Schwing admitted falsifying call reports, we find the trial testimony of Mr. Schwing credible that he never admitted to falsifying call reports.

[9] As noted in footnotes 4 and 5 above, plaintiff withdrew his claims under the Lilly Global Shares Stock Option Plan and The Eli Lilly and Company Health Care Flexible Spending Plan. Accordingly, we do not address any claims under those plans here.

22. The Employee Benefits Committee reviews all claims under the various employee benefit plans, is the named fiduciary for purposes of ERISA, and has certain powers granted to it.[10]

23. Members of the Employee Benefits Committee ("EBC") are sent for training prior to adjudicating claims before the EBC. Attorney Sommers generally gives that training.[11]

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[10] Section 4.03 of the Eli Lilly and Company Employee Welfare Plan provides in pertinent part:

> In addition to any implied powers and duties that may be needed to carry out the provisions of this instrument, the Employee Benefits Committee shall have the following specific powers and duties with respect to the Welfare Plan, and with respect to any Component Plan (or portion thereof) that the Employee Benefits Committee administers:
>
> (a) To make and enforce such rules and regulations as it shall deem necessary or proper for the efficient administration of the Component Plans;
>
> (b) To interpret this Welfare Plan instrument and any Component Plan instrument, and to decide any and all matters arising thereunder, including the right to remedy possible ambiguities, inconsistencies or omissions;

Plaintiff's Exhibit 57 at page 6.

[11] Attorney Sommers developed a powerpoint presentation to advise members of their duties and responsibilities as members of the EBC. See Plaintiff's Exhibit 82.

24. Members of the EBC are not specifically advised about their duty of loyalty to plan participants.[12]

25. Before Schwing's claim for severance benefits, the EBC never had a claim for benefits under the Severance Plan.

26. The EBC relied on Lilly's investigation of Schwing's conduct, the "process"[13] and the input of in-house counsel[14] to make its decision on Schwing's severance benefits.

Schwing Benefits Claim

Severance Benefit Claim

27. The Severance Plan and Summary Plan description for the Severance Plan were in effect at the time of Schwing's termination on August 22, 2001.

28. At the time of Schwing's termination, Section 3.01 of the Severance Plan provided as follows:

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[12] N.T., March 8, 2005, at page 47, lines 13-18.

[13] Lisa Schlehuber testified at her deposition on June 24, 2004 that the company process relied upon by the EBC was a process that "included line management, line HR, human resources, the Affirmative Action/EEO group, that they followed their normal procedures in determining the cause of misconduct." June 24, 2004 Deposition of Lisa Schlehuber at 75; See also N.T., March 8, 2005, at 96.

[14] N.T., March 8, 2005, at 80.

> Subject to the discretion of the Employer, and subject to the provisions of subsection 3.02 and. . .Section 4 hereof, an Employee shall be eligible to receive from his employer a severance benefit in the amount calculated in accordance with subsection 3.02 hereof upon termination of the Employee's employment with the Employer for the following reasons:
>
> (a) Discharge, or resignation in lieu of discharge, for reasons other than those specified in subsection 4.03 hereof. . . .[15]

29. At the time of Schwing's termination and during the time he was requesting benefits, the Severance Plan was unfunded. No assets were set aside in a special trust specifically for payment of severance benefits.

30. Severance payments come directly from the corporate cash of Lilly.

31. As of August 22, 2001, Schwing's monthly income was $7,295.

32. By letter dated September 28, 2001, Schwing, through his attorney, Elliott Strokoff, Esquire, made a formal claim for severance benefits under the Severance Plan.[16]

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[15] See Plaintiff's Exhibit 56.

[16] Plaintiff's Exhibit 10.

33. In the September 28, 2001 letter, plaintiff contended that the allegations against him were "fabricated and pretextual" and that he was not discharged "for any of the reasons disqualifying him from receiving severance pay under the Severance Plan."

34. In response to the September 28, 2001 letter, Sandra J. Sommers, Esquire, Associate General Counsel of Human Resources for Lilly and counsel to the Employee Benefits Committee, sent a letter informing Attorney Strokoff that the EBC would consider Schwings's claim on November 9, 2001 and that Mr. Schwing could provide the EBC with additional information to support his claim.[17]

Consideration of Initial Claim
for Severance Benefits

35. Prior to the November 9, 2001 EBC meeting, Attorney Sommers requested information from Hallinin and Martin concerning plaintiff's termination.

36. Based upon the request of Attorney Sommers, Hallinin drafted two documents entitled "Employee Background" and "Summary of August 22, 2001 Meeting" for use by the EBC in reviewing plaintiff's claim for severance benefits.[18]

37. Based upon the request of Attorney Sommers, Martin drafted a document entitled

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[17] Plaintiff's Exhibit 13.

[18] Defendants' Exhibit 6.

"Meeting Summary with Kevin Schwing August 22, 2001."[19]

38. The typed summaries provided by Hallinin and Martin were created specifically in response to Schwing's claim to the EBC for severance benefits.

39. On November 7, 2001 each member of the EBC was sent an agenda for the November 9, 2001 meeting by electronic mail ("e-mail").The agenda included a recommendation from Attorney Sommers that Schwing's claim for severance benefits be denied.

40. On November 8, 2001 the EBC members were sent an e-mail of materials submitted to the EBC members for review prior to their November 9, 2001 meeting. The pre-read materials included the summaries created by Hallinin and Martin.

41. Neither plaintiff nor his counsel, Attorney Strokoff were provided the Hallinin and Martin summaries prior to the November 9 meeting.

42. On November 8, 2001 Attorney Strokoff faxed a letter to Attorney Sommers responding to Attorney Sommers' letter dated October 26, 2001. This letter was not provided to the EBC for the November 9 meeting.

43. The EBC was provided with neither the handwritten notes of Martin, nor the script used by Martin and Hallinin during the August 22, 2001 meeting with Schwing.

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[19] Id.

44. The EBC met on November 9, 2001. Attorney Sommers acted as presenter, delivered a powerpoint presentation to the EBC related to Schwing's claim, and answered questions posed by members of the EBC. Moreover, Attorney Sommers took a major role in determining the content of the pre-read materials.

45. The minutes of the EBC meeting on November 9 state: "The Committee reviewed the facts in the case and denied the claim based upon the language under the Plan stating that termination for misconduct is not severance-eligible."

46. After the November 9 meeting, Attorney Sommers returned to her office and found the November 8, 2001 letter submitted on plaintiff's behalf by Attorney Strokoff.

47. The November 8 letter from Attorney Strokoff stated, among other things, that the allegations against Schwing were fabricated and pretextual; that he was a loyal 21-year employee who was never told the reason for his termination; that during the August 22 meeting, Hallinin and Martin conceded that Schwing was at the group practices at the days and times entered; and that he was "not truly fired for misconduct or dishonesty, but rather as payback for having filed a grievance...."[20]

48. Prior to submitting Attorney Strokoff's letter to the EBC, Attorney Sommers contacted Hallinin, Martin and Melissa Popa ("Popa") of the Human

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[20] Plaintiff's Exhibit 15.

Resources Department to have them respond to plaintiff's allegations.

49. Based upon the responses of Hallinin, Martin and Popa, Attorney Sommers produced a document that contained both plaintiff's averments together with the responses and forwarded that document to the EBC members for their consideration. Attorney Sommers did not submit the document to plaintiff's counsel.

50. The EBC was unaware that plaintiff was provided neither the Hallinin or Martin summaries, nor the responses they both made to Attorney Strokoff's November 8 letter.[21]

51. The EBC reconsidered its November 9 decision in light of the information provided on behalf of plaintiff and again voted to deny Schwing's claim.

52. By letter dated November 30, 2001, the EBC notified Attorney Strokoff that it had denied Schwing's claim under the severance plan.

Appeal of Denial of Severance Benefits

53. By letter dated December 10, 2001, Schwing, through his attorney, appealed the denial of his severance claim and requested that the EBC provide him with additional information about the reasons for the denial of his claim.

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[21] N.T., March 8, 2006, at 109.

54. On January 25, 2002 Attorney Sommers responded to the December 10, 2001 letter from Attorney Strokoff and provided the information which the EBC considered in reviewing Schwing's claim for severance benefits. The letter further advised that Schwing had until February 28, 2002 to provide any additional information for the next EBC meeting on March 5, 2002.

55. By letter dated February 28, 2002, Attorney Strokoff submitted additional information to the EBC. In addition, the letter requested a hearing to permit plaintiff to present the doctors in question who according to plaintiff were prepared to testify on his behalf and to resolve the credibility determinations which the matter required.[22]

56. On March 2, 2002 Schwing sent a letter to the severance committee outlining additional information for the EBC's review and specifically addressing the contentions of Mr. Hallinin's summaries and his responses to the November 8, 2001 letter from Attorney Strokoff.

57. The EBC did not meet as scheduled on March 5, 2002.

58. On March 29, 2002 Charles A. Grandy, an attorney in Attorney Sommers group, sent a memorandum by e-mail to the EBC members regarding plaintiff's appeal of the denial of severance benefits. The e-mail contained a statement by John Purcell, Manager of the Employee Benefits and

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[22] Plaintiff's Exhibit 30.

Services Department at Lilly, recommending that Schwing's appeal be denied. The e-mail further asked each member to review the submitted materials and notify EBC Secretary Kimberly Peterson of their vote.

59. The EBC never met to discuss Schwing's appeal. The matter was decided on a "consent to action".

60. The EBC claims it never received the March 2, 2002 letter sent Schwing, and did not consider it.

61. On April 15, 2002 Schwing sent two letters dated April 9 and 13, 2006 to Laura Lemmons, a paralegal in Attorney Sommers department, in support of his claim for severance benefits.[23]

62. Attorney Sommers did not forward the April 9, 2002 and April 13, 2002 letters from Schwing to the EBC.

63. By letter dated April 22, 2002 plaintiff was notified that the EBC denied his appeal for severance benefits.

64. The EBC did not conduct a hearing on either plaintiff's original claim for severance benefits or his appeal.

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[23] Plaintiff's Exhibits 36 and 37.

65. The EBC was empowered to conduct a hearing on plaintiff's claim for severance benefits.[24]

66. The EBC did not issue a decision on plaintiff's appeal within the time required by the Severance Plan.[25]

Plaintiff's Vacation Pay Claim

67. Pursuant to its standard practice, Lilly paid Schwing his normal monthly salary on August 15, 2001 for the entire month of August 2001.

68. Lilly terminated Schwing's employment on August 22, 2001.

69. Schwing had accrued 13 vacation days as of August 22, 2001.

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[24] See Plaintiff's Exhibit 57 at page 7. (Claims Review Procedure Section 4.07(4)).

[25] The Severance Plan incorporates the Claims Review Procedure set forth in the Eli Lilly and Company Employee Welfare Plan. Section 4.07(4) of the Welfare Plan provides in pertinent part:

> The decision by the Employee Benefit Committee with respect to review [of the denial of a claim] will be given within 60 days after receipt of the request, unless special circumstances require an extension (such as a hearing). In no event will the decision be delayed beyond 120 days after receipt of the request for review.

In this case, plaintiff's appeal letter was dated December 10, 2001 and was received on December 17, 2001. The EBC did not issue the ruling on the denial of the appeal until April 22, 2002, 126 days after the receipt of the appeal.

70. Schwing used eight vacation days prior to August 22, 2001, leaving five accrued vacation days.

71. Because Lilly paid Schwing for the entire month on August 15, 2001 and terminated him on August 22, 2001, Lilly's last paycheck to Schwing overpaid him for seven days.

72. Schwing did not make a claim to the EBC for vacation pay under the Vacation Plan.

73. Schwing did not exhaust administrative remedies under the vacation plan regarding any vacation pay claim.

Breach of Oral Contract

75. As a matter of business practice, Lilly does reimburse its sales representatives for specific expenses incurred in carrying out Lilly's business.

76. Lilly requires sales representatives to submit their expenses in accordance with Lilly guidelines.

77. Hallinin gave Schwing a final expense report form.

79. Schwing submitted his final expense report to Hallinin.

80. Plaintiff's final expense report contained expenses for a large event that was not pre-approved by Hallinin.

81. Plaintiff was explicitly told that he would not be reimbursed for this large event expense.

82. It is Lilly's practice to deny any expense report in whole when any individually claimed expense is denied.

83. Plaintiff's final expense report contained an individually claimed expense that was denied.

83. Plaintiff never followed up on seeking reimbursement for his final expense report.

CONCLUSIONS OF LAW

1. The decision of the Employee Benefits Committee denying plaintiff's claim for severance benefits was arbitrary and capricious.

2. The Employee Benefits Committee did not give plaintiff a full and fair review of his severance claim.

3. Attorney Sommers' conduct in this matter constitutes a conflict of interest.

4. Plaintiff is entitled to judgment for the severance benefit he is due in the amount of $102,130.

5. Counsel for plaintiff are entitled to attorneys' fees as the prevailing party on plaintiff's claim for severance benefits.

6. Plaintiff has not proven by a preponderance of the evidence that he is entitled to any unpaid vacation time.

7. Plaintiff has not proven by a preponderance of the evidence that he is entitled to any reimbursement for final expenses.

DISCUSSION

Standard of Review

Under ERISA a beneficiary of a benefits plan may bring an action to recover benefits due to him under the plan. 29 U.S.C. § 1132(a)(1)(B); Poehlmann v. Deutsche Bank Americas Severance Pay Plan, 2005 U.S. Dist. LEXIS 16118 at *13 (E.D.Pa. Aug. 8, 2005)(Schiller, J.). However, ERISA is silent on the proper standards by which the district court should review fact findings made by plan administrators. Luby v. Teamsters Health, Welfare & Pension Trust Funds, 944 F.2d 1176, 1179 (3d Cir. 1991).

In Firestone Tire and Rubber Company v. Bruch, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989), the United States Supreme Court held that courts must review a denial of ERISA benefits under a de novo standard of review unless the "benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." When the plan confers such discretion, courts are to apply an arbitrary and capricious standard of review. Smathers v. Multi-Tool Inc./Multi-Plastics, Inc. Employee Health and Welfare Plan, 298 F.3d 191, 194 (3d Cir. 2002); Doyle v. Nationwide Insurance Companies & Affiliates Employee Health Care Plan, 240 F.Supp.2d 328, 335 (E.D.Pa. 2003).

In this case, the Lilly Employee Welfare Plan ("Welfare Plan"), of which the Severance Plan is a component part, grants broad discretion to the Employee Benefits Committee. Section 4.03 of the Welfare Plan specifically authorizes the EBC to

"interpret" the terms of the plan and the terms of each component plan and "to decide any and all matters arising thereunder, including the right to remedy possible ambiguities, inconsistencies or omissions."

We conclude that the grant of authority to the EBC to construe the terms of the plan and decide all matters arising thereunder confers the necessary discretion to take the this matter out of the de novo standard of review. Accordingly, we conclude that a de novo standard of review is not appropriate.

However, this does not end our inquiry. As an alternative to de novo review, plaintiff seeks to have the court utilize a heightened arbitrary and capricious standard of review pursuant to the decision of the United States Court of Appeals for the Third Circuit in Pinto v. Reliance Standard Life Insurance Company, 214 F.3d 377 (3d Cir. 2000). This heightened standard is a sliding scale which enables the court to review the merits of the determination of the EBC to determine if it is "consistent with an exercise of discretion by a fiduciary acting free of the interests that conflict with those of beneficiaries." 241 F.3d at 391.

"[W]hen a court is deciding what standard of review to employ – arbitrary and capricious review, or some higher standard under *Pinto* – it may consider evidence of potential biases and conflicts of interest that is not found in the administrator's record." Kosiba v. Merck & Company, 384 F.3d 58, 67 n.5 (3d Cir. 2004), cert denied 544 U.S. 1044, 1255 S.Ct. 2252, 161 L.Ed.2d 1079 (2005). The burden of proof is on plaintiff to show that a heightened standard of review is appropriate. Schlegel v. Life Insurance Company of North America 269 F.Supp.2d 612, 617 (E.D.Pa. 2003).

In this case, as more fully explained below, we conclude that Attorney Sommers, in-house counsel for defendant Eli Lilly and Company, was operating under a serious conflict of interest and that the structural relationship of her role as counsel for both Lilly and the EBC tainted the review process. Accordingly, based upon the conflict of interest of Attorney Sommers, we conclude that plaintiff has satisfied his burden, and we must apply a heightened arbitrary and capricious standard.

Conflict of Interest

Plaintiff contends that in her role as counsel for the EBC, Attorney Sommers had a fiduciary duty to plaintiff. In this regard, plaintiffs rely on the case of Koch v. Exide Corporation, 1989 U.S. Dist. LEXIS 5083 (E.D.Pa. May 9, 1989)(Hewitt, J.).

On the contrary, defendants contend that under ERISA, an employee (including an attorney) of a plan's sponsor can advise the plan's fiduciary on benefit claims. Defendants rely on the decision of the United States Court of Appeals for the Third Circuit in Ashenbaugh v. Crucible, Inc., 1975 Salaried Retirement Plan, 854 F.2d 1516 (3d Cir. 1988). For the following reasons, we agree in part with plaintiff and in part with defendants.

In Koch, the court stated: "When an attorney advises a fiduciary about a matter dealing with the administration of an employees' benefit plan, the attorneys' client is not the fiduciary personally but, rather, the trust's beneficiaries." This general

proposition has been applied in numerous courts in the context of the attorney-client privilege.[26]

None of the cases applying this concept have declared that a fiduciary relationship exists between the attorney and the beneficiary. Thus, we disagree with plaintiff's contention that a fiduciary relationship existed between Attorney Sommers and Mr. Schwing in this case. Moreover, we agree with defendants that there is nothing inherently improper with Attorney Sommers providing advice to the EBC. See Ashenbaugh, supra. However, it is illogical to conclude that in the context of the attorney-client privilege, the relationship between counsel for the fiduciary and the beneficiary is one of attorney and client but that attorney-client relationship does not exist in any other circumstance.

More specifically, as counsel to the EBC, Attorney Sommers represented the EBC and all the beneficiaries of the plan, including Mr. Schwing. In that regard, Attorney Sommers could give legal advice and opinions to EBC members regarding their duties and responsibilities as fiduciaries, give guidance on the meaning of terms contained in plan documents or answer questions EBC members may have had.

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[26] Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970); In re Unisys Corporation Retiree Medical Benefits ERISA Litigation, 1994 U.S. Dist. LEXIS 1344 (E.D.Pa. Jan. 5, 1994)(Cahn, C.J.); Washington-Baltimore Newspaper Guild Local 35 v. The Washington Star Company, 543 F.Supp. 906 (D.D.C. 1982); Riggs National Bank of Washington D.C. v. Zimmer, 355 A.2d 709 (Del. Ch. 1976).

In this regard, we conclude that Attorney Sommers is free to act as counsel for the EBC, but is not free to also act as counsel for the company at the same time. We conclude that this is exactly what happened in this case.

Furthermore, we conclude that Attorney Sommers was not required to act as actual counsel or as an advocate for Mr. Schwing, (he had his own counsel Mr. Strokoff), but Attorney Sommers could not act against Mr. Schwing's interests because he is also her client for purposes of her representation of the EBC.

To adhere to her obligations to as counsel for the EBC, Attorney Sommers was obligated to exhibit neutrality, and she failed to do so. Rather, what Attorney Sommers did was act as both counsel for Lilly and for the EBC at the same time. Attorney Sommers' actions in this case created a serious conflict of interest and denied plaintiff a full and fair review by the EBC.

Attorney Sommers acted as gatekeeper for the documents that the EBC would consider. Specifically, she requested that Mr. Hallinin and Ms. Martin provide summaries of the events concerning plaintiff's termination of employment. However, Attorney Sommers did not provide those summaries to plaintiff or his counsel before the appeal process. In addition, Mr. Hallinin's "Employee Background" summary included information that was not part of the decision to fire Mr. Schwing, and was relevant for no other purpose than to hold Mr. Schwing in a bad light.

Moreover, when Attorney Strokoff submitted his November 8, 2001 letter on behalf of plaintiff, Attorney Sommers contacted Mr. Hallinin, Ms. Martin and Ms.

Popa and requested that they respond to plaintiff's allegations. Once again, these responses were not provided to plaintiff until after the EBC ruled on his original claim for benefits.

All of Attorney Sommers actions were consistent with her role as in-house counsel for Lilly, not as counsel for the EBC and certainly not in the interests of Mr. Schwing. In addition, Attorney Sommers included in her presentation to the EBC a recommendation that Mr. Schwing's claim for severance benefits be denied. This was clearly against Mr. Schwing's interest.

Finally, with regard to plaintiff's appeal of the original determination by the EBC to deny benefits, Attorney Sommers kept from the EBC certain documents sent by plaintiff after the February 28, 2002 deadline for submission of materials, but before the April 22, 2002 decision by the EBC to deny plaintiff's appeal. We conclude that this act was done to plaintiff's detriment.

However, as noted above, Attorney Sommers had previously solicited responses to plaintiff's contentions from Mr. Hallinin, Ms. Martin and Ms. Popa after the deadline for submissions. Moreover, Hallinin and Martin were permitted to respond to Mr. Strokoff's February 28, 2002 letter after the February 28, 2002 deadline and these responses were never sent to plaintiff or his counsel.

Attorney Sommers actions evidences an arbitrary exercise of discretion in favor of the company. As noted earlier, when Attorney Sommers is acting in her role as counsel for the EBC, she may not also

simultaneously act as counsel for the company. She must divorce herself from the company when acting as counsel for the EBC. To do otherwise enables the company to improperly dominate the decisions of the EBC.

For all the foregoing reasons, we conclude that Attorney Sommers operated under a serious conflict of interest which denied plaintiff the full and fair review that is required under ERISA and the Severance Plan, her actions tainted the entire process and created an unfair advantage for the company. Accordingly, applying a heightened arbitrary and capricious standard to the decisions of the EBC, we conclude that plaintiff is entitled to benefits under the Severance Plan.

Arbitrary and Capricious Review

In the event that we are mistaken in our analysis above, we review the decision of the EBC under the traditional arbitrary and capricious standard of review as well.

The arbitrary and capricious standard is deferential to the decisionmaking of the EBC and is akin to the abuse of discretion standard commonly utilized by courts. See Abnathya v. Hoffman-La Roche, Inc., 2 F.3d 40 (3d Cir. 1993). In reviewing a matter under the arbitrary and capricious standard, a district court "may overturn a decision of the Plan administrator only if it is without reason, unsupported by substantial evidence or erroneous as a matter of law." 2 F.3d at 45. The decision of the plan administrator is supported by substantial evidence "if there is sufficient evidence for a reasonable person to

agree with the decision." Courson v. Bert Bell NFL Player Retirement Plan, 214 F.3d 136, 142 (3d Cir. 2000).

In analyzing the reasonableness of the EBC's decisions, we must examine the record before the EBC as a whole. We must not substitute our own judgment for that of the EBC in determining whether to award benefits. Poehlmann, 2005 U.S. Dist. LEXIS at *20.

The "task as a reviewing court is to determine first, whether the administrator considered all the relevant factors, and second, whether the decision constituted a clear error of judgment. Daniels v. Anchor Hocking Corporation, 758 F.Supp. 326, 331 (W.D.Pa. 1991). Accordingly, unless the decisions of the EBC were not rational, we must uphold its decisions. Shiffler v. Equitable Life Assurance Society, 838 F.2d 78 (3d Cir. 1988).

EBC Review of Plaintiff's Initial Claim

In our review of the decisions of the EBC, we do not address the conduct of Attorney Sommers. Rather, we look solely at the documents that were submitted to the EBC for their consideration.

In its initial determination,[27] the EBC had before it the following documents: (1) the Employee Background

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[27] We do not address the documents the EBC had before it on November 9, 2001 because the EBC reconsidered its November 9, 2001 decision after Attorney Sommers resubmitted the matter for consideration upon receipt of the November 8, 2001 letter from Attorney Strokoff.

summary prepared by Jeff Hallinin;[28] (2) the Summary of August 22, 2001 Meeting prepared by Jeff Hallinin;[29] (3) the Summary of August 22, 2001 Meeting prepared by Valerie Martin;[30] (4) the November 8, 2001 Letter from Attorney Strokoff with the superimposed responses from Mr. Hallinin, Ms. Martin and Ms. Popa;[31] and (5) the presentation slides from the November 9, 2001 meeting of the EBC prepared by Attorney Sommers.[32]

A review of the materials submitted to the EBC reveals that there are conflicting explanations of the events between the pertinent individuals. Specifically, Mr. Hallinin and Ms. Martin alleged that Mr. Schwing knew the reasons for his termination. Plaintiff disputed this. In addition, Mr. Hallinin and Ms. Martin asserted that when the calls were placed by Mr. Hallinin to the Good Hope Family Practice and the Middletown Family Practice they were told that some of the doctors plaintiff reported seeing on certain days were not in the office that day.

Plaintiff contended to the contrary, that according to Jeannie, the receptionist at Good Hope Family Practice, the question asked by Mr. Hallinin was whether the doctors were "on the schedule" on a given

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[28] Plaintiff's Exhibit 6.

[29] Plaintiff's Exhibit 7.

[30] Plaintiff's Exhibit 9.

[31] Defendants' Exhibit 9.

[32] Defendants' Exhibit 9.

day? Plaintiff contended that was not the correct question. Rather, the correct question should have been whether the doctors were "in the office" on a particular day, notwithstanding whether or not they were on the schedule.

Plaintiff further asserted that the doctors were in the office on the days in question and that he saw all of the doctors which he reported seeing. Moreover, plaintiff asserted that Mr. Hallinin and Ms. Martin conceded at the August 22, 2001 meeting that Mr. Schwing was present at the group practices and that he possessed written confirmation of his presence.

Next, plaintiff asserted to the EBC his belief that the actions of Mr. Hallinin and Ms. Martin were in retaliation for a prior grievance he filed involving Sales Manager Val Hobson. Mr. Hallinin and Ms. Martin denied that there was any retaliation.

Ms. Schlehuber testified that the EBC relied on the company "process" in making its decision;[33] that it was not the role of the EBC to review the reasons or rationale for the termination of plaintiff's employment;[34] that the EBC did not debate the actual actions of the company which resulted in the determination to fire Mr. Schwing;[35] that the EBC relied on the investigation of the company;[36] and that

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[33] N.T., March 8, 2005, at 96.

[34] June 24, 2004 Deposition of Lisa Schlehuber, at 125.

[35] June 24, 2004 Deposition of Lisa Schlehuber, at 127.

[36] N.T., March 8, 2005, at 116.

it took the statements of Mr. Hallinin and Ms. Martin at face value.[37]

Based upon all of Ms. Schlehuber's statements about what the EBC did and did not do in this matter, we conclude that plaintiff was denied a full and fair review of his severance claim because the EBC "wholly abdicated its responsibility to make even a cursory investigation into Plaintiff's claim, and thereby unreasonably concluded that Plaintiff's claim should be denied." Poehlmann, 2005 U.S. Dist. LEXIS at *26.

In general, the EBC was not required to conduct an evidentiary hearing. The EBC has no affirmative duty to gather information in making its determination. See Doyle, 240 F.Supp.2d at 340, (citing Pinto, 214 F.3d at 394 n.8; see also Friess v. Reliance Standard Life Insurance Insurance Company, 122 F.Supp.2d 566, 573 (E.D. Pa. 2000). However, the EBC did have an affirmative duty to take into account all comments, documents, records, and other information submitted by the claimant relating to the claim. 29 C.F.R. § 2560.503-1(h)(2)(iv).

The EBC owed plaintiff a fiduciary duty of loyalty.[38] The EBC was not aware of this duty.[39] By simply crediting the statements, investigation and conclusions of the company representatives, the EBC breached its duty of loyalty to plaintiff. Moreover, it was

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[37] N.T., March 8, 2005, at 117.

[38] Varity Corporation v. Howe, 516 U.S. 489, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996).

[39] See Finding of Fact 24.

unreasonable to simply credit the averments of the company representatives in the face of a serious challenge to these averments. Poehlmann, 2005 U.S. Dist. LEXIS at *27.

We conclude that the EBC completely abdicated its responsibilities in this case and in doing so, its decision on the initial claim was arbitrary and capricious. Had the EBC done more than just simply credit the investigation and conclusions of the company in this matter, it may well have determined that plaintiff had not committed misconduct. The failure to engage in any independent analysis with conflicting accounts presented to it is what makes the EBC's determination unreasonable, and thus, arbitrary and capricious.

EBC Review of Plaintiff's Appeal

In its review of plaintiff's appeal of the initial denial of his claim for severance benefits, the EBC was presented with all the documents reviewed on the initial appeal together with the February 28, 2002 letter from Attorney Strokoff and responses to that letter by Mr. Hallinin and Ms. Martin.

The EBC did not actually meet regarding plaintiff's appeal. Rather, they individually reviewed the documents and consented to issue a decision without a meeting.

We note that Attorney Strokoff's letter provided additional information indicating conflict between the accounts of Mr. Hallinin and Ms. Martin and that of plaintiff. The plaintiff's averment that he never

admitted falsifying any records of client calls is significant in this regard.

Moreover, plaintiff pointed out to the EBC that there may be handwritten notes of the August 22, 2001 meeting which were not been produced by the company. In addition, plaintiff alleged that both Mr. Hallinin and Ms. Martin acknowledged that they knew of plaintiff's prior grievance. Finally, plaintiff questioned how the EBC could come to its decision on his claim for severance benefits without conducting an investigation or holding a hearing to resolve the numerous factual differences.

The responses of Mr. Hallinin and Ms. Martin attempted to refute plaintiff's assertions. However, what those responses reveal is that there were considerable differences between their version and Mr. Schwing's version of the events. The credibility of a person cannot be determined on a cold record. Moreover, in light of the divergent accounts given by the company representatives and Mr. Schwing, it appears that the EBC came to its determination by simply crediting the company process and witnesses. As noted above, that is improper and a complete dereliction of its duties under the Severance Plan and under ERISA. Poehlmann, supra.

Accordingly, based upon all the foregoing, we conclude that the decision of the Employee Benefits Committee to deny plaintiff severance benefits was

arbitrary and capricious. Therefore, plaintiff is entitled to severance benefits in the amount of $120,130.[40]

Vacation Claim

Plaintiff seeks compensation for vacation days accrued but not taken prior to his termination of employment. Specifically, plaintiff seeks $4,851.17 for eleven unused vacation days.

In response, defendants assert that plaintiff is not entitled to any vacation pay. Defendants contend that plaintiff accrued vacation time each month. Specifically, plaintiff had accrued 13 vacations days as of August 22, 2001 when his employment was terminated. Moreover, defendants note that plaintiff testified that he had already used one week of vacation and an additional two or three days prior to his firing.

In addition, defendants contend that because plaintiff was paid monthly on the 15th day of each month (representing two weeks compensation for past work, and two weeks for future work), plaintiff was paid for seven days on which he did not work (because of his termination). Defendants argue that plaintiff's receipt of seven days pay for work plaintiff did not perform offsets the company's obligation to compensate plaintiff for seven days of unused vacation.

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[40] The $120,130 figure is determined by multiplying plaintiff's final monthly salary by fourteen based upon the number of years of service (21 years but less than 22 years). See Plaintiff's Exhibit 56 (The Lilly Severance Pay Plan at Section 3.02(a)).

Defendants assert that after deducting those seven days from plaintiff's accrued 13 vacation days, plaintiff was entitled to 6 vacation days during that period. However, plaintiff took seven or eight vacation days prior to being fired. Therefore, plaintiff is not entitled to any additional vacation benefits. We agree.

Finally, defendant contends that plaintiff never made a claim with the EBC under The Eli Lilly and Company Holiday and Vacation Plan for these vacation benefits and is barred by ERISA from seeking those benefits now for failure to exhaust his administrative remedies.

In response to the exhaustion requirement, plaintiff contends that he is excused from exhausting administrative procedures under ERISA if it would be futile to do so. Harrow v. Prudential Insurance Company of America, 279 F.3d 244, 249 (3d Cir. 2002). However, we do not need to address the exhaustion issue because we conclude that plaintiff is not entitled to any vacation time for the following reasons.

Specifically, based upon the testimony of plaintiff, we conclude that he used either seven or eight vacation days prior to the termination of his employment. Moreover, plaintiff does not dispute that he was paid for the entire month of August 2001, that he was fired on August 22, 2001 and that therefore, he was paid for an additional seven days after his termination.

This computation results in plaintiff either using or being paid for at least fourteen and possibly fifteen days of vacation time. Plaintiff had only accrued 13 days vacation at the time of his dismissal. Therefore,

we conclude that plaintiff has not proven by a preponderance of the evidence that he is entitled to any remaining vacation time that he has not otherwise used or been compensated for.

Accordingly, notwithstanding the fact that plaintiff never submitted a claim for vacation benefits, we conclude that he is not entitled to any further vacation compensation.

Breach of Contract

Plaintiff asserts a cause of action for breach of an oral contract related to his final expense report. In this regard, plaintiff contends that he submitted a final expense report in the amount of $2,033.09 on the form provided by his supervisor, Mr. Hallinin, and was not paid for those expenses.

In response to plaintiff's claim, defendants contend that Mr. Schwing never submitted a proper expense report. Specifically, defendants contend that the expense report submitted by plaintiff contained claims for improper expenses. Moreover, defendants contend that the Lilly company policy in effect at the time was that if any claimed expense were denied, the entire expense report would be denied with leave to resubmit without the denied expense.

Defendants contend that when Mr. Schwing submitted his final expense report it contained an expense for a program for physician assistants that Mr. Schwing had been told by Mr. Hallinin would not be reimbursed because of budget restraints.

Plaintiff contends that the physician assistant program was very important to his business, was scheduled prior to the new guidelines for these types of programs, and that Mr. Hallinin agreed that he would be reimbursed. Therefore, plaintiff asserts that he and Mr. Hallinin had an oral contract regarding payment of this expense. Moreover, plaintiff contends that Mr. Hallinin never denied any previous expense prior to his employment being terminated.

For the following reasons, we conclude that plaintiff has not proven the existence of an oral contract by a preponderance of the evidence. Furthermore, plaintiff has not proven by a preponderance of the evidence what, if any, expenses submitted to Lilly are proper.[41]

Plaintiff contends that he and Mr. Hallinin entered into an oral contract whereby Mr. Schwing would be reimbursed for the physician assistant program at Leeds Bar and Grill in Harrisburg, Pennsylvania. However, Mr. Schwing admitted that Mr. Hallinin advised him that this expense would not be approved. Mr. Schwing contends that this oral agreement was contingent on Mr. Schwing increasing his sales of the drug Zyprexa.

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[41] Plaintiff's Exhibit 60 is a copy of Mr. Schwing's final expense report. It contains request for reimbursement of certain business meals or entertainment, a claim for mileage and expenses for his home telephone and cellular phone. It is clear from the testimony adduced at trial that the charge for Leeds Bar and Grill in the amount of $1,067 was disputed by defendant Lilly. However, it is unclear whether any other charge was disputed. Plaintiff did not offered any testimony or evidence in support of any other claimed expense on the report beyond the Leeds Bar and Grill expense.

We did not find Mr. Schwing's testimony regarding this oral agreement credible. Moreover, we conclude that this alleged oral agreement was too speculative to be enforceable. There was no indication by Mr. Schwing how much of an increase in sales he would have to attain to qualify for the reimbursement. Moreover, there is no indication that Mr. Hallinin had the authority to bind defendant Lilly to such an agreement.

It seems that at best, Mr. Schwing had an agreement from Mr. Hallinin that if Mr. Schwing's sales of Zyprexa increased to some unknown number, Mr. Hallinin *might* talk to his supervisor about getting Mr. Schwing reimbursed for this expense. This is not an enforceable contract for reimbursement by Lilly.

In addition, while plaintiff submitted his final expense report into evidence, he did not explain or justify any other charge on the expense report other than the Leeds Bar and Grill expense. Moreover, plaintiff conceded that he never followed up with the Human Resources Department at Lilly to ascertain whether he could be reimbursed for any other expenses.

Based upon the evidence before the court, it is impossible to determine what, if any, expenses contained on plaintiff's final expense report are legitimate. Accordingly, we conclude that plaintiff has not satisfied his burden of proving his claim by a preponderance of the evidence.

Accordingly, plaintiff's claim for breach of oral contract and his concurrent claim for reimbursement of his final expenses is denied.

Attorneys' Fees

Both parties have requested attorneys' fees pursuant to 29 U.S.C. § 1132(g) in this matter. Plaintiff prevailed on his claim for severance benefits and may be entitled to attorneys' fees as the prevailing party. Defendants contend that they are entitled to counsel fees for having to defend a number of meritless claims originally filed and subsequently withdrawn by plaintiff including: The Lilly Health Plan; The Eli Lilly and Company Life Insurance and Death Benefit Plan; The Eli Lilly and Company Healthcare Flexible Spending Plan; The Eli Lilly and Company Dependent Daycare Flexible Spending Plan; The Lilly Dentalplus Plan; PCS Pharmacy Benefits Management Service Program; The Lilly Employee Savings Plan; The Lilly Retirement Plan; and The Lilly Global Shares Stock Option Plan. We make no determination on any award of counsel fees by any party at this time. We will permit any party to file a proper fee petition on or before November 15, 2006.

CONCLUSION

For the reasons expressed above, we find in favor of plaintiff Kevin Schwing and against defendants Eli Lilly and Company, The Lilly Severance Pay Plan and The Employee Benefits Committee in the amount of $102,130 on plaintiff's claim under the severance pay plan.

We find in favor of defendants Eli Lilly and Company, The Eli Lilly and Company Holiday and Vacation Plan and The Employee Benefits Committee and against plaintiff Kevin Schwing on plaintiff's claim for vacation benefits.

We find in favor of defendants Eli Lilly and Company, The Eli Lilly and Company Health Care Flexible Spending Plan and The Employee Benefits Committee and against plaintiff Kevin Schwing on plaintiff's claim for medical benefits.

We find in favor of defendants Eli Lilly and Company, the Lilly Global Shares Stock Option Plan and The Employee Benefits Committee and against plaintiff Kevin Schwing on plaintiff's claim for stock options.

And we find in favor of defendant Eli Lilly and Company and against plaintiff Kevin Schwing on plaintiff's claim for reimbursement of his final expenses.

Finally, all parties have until November 15, 2006 to file a fee petition pursuant to 29 U.S.C. § 1132(g).

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 06-4671

[Filed August 26, 2010]

ESTATE OF KEVIN SCHWING	)
	)
v.	)
	)
THE LILLY HEALTH PLAN; THE ELI LILLY AND COMPANY LIFE INSURANCE AND DEATH BENEFIT PLAN; THE ELI LILLY AND COMPANY HEALTH CARE FLEXIBLE SPENDING PLAN; THE ELI LILLY AND COMPANY DEPENDENT DAY CARE FLEXIBLE SPENDING PLAN; THE LILLY SEVERANCE PAY PLAN; THE ELI LILLY AND COMPANY HOLIDAY AND VACATION PLAN; THE LILLY DENTAL PLUS PLAN; PCS PHARMACY BENEFITS MANAGEMENT SERVICE PROGRAM; THE LILLY EMPLOYEE SAVINGS PLAN; THE LILLY RETIREMENT PLAN; ELI LILLY AND COMPANY, INDIVIDUALLY AND AS PLAN SPONSOR, FIDUCIARY AND ADMINISTRATOR OF THE LILLY RETIREMENT PLAN, AND THE LILLY SEVERANCE PAY PLAN, AND THE ELI LILLY AND COMPANY HOLIDAY AND	)

VACATION PLAN, AND THE LILLY HEALTH)
PLAN, AND THE LILLY DENTAL PLUS)
PLAN, AND PCS PHARMACY BENEFITS)
MANAGEMENT SERVICE PROGRAM; THE)
EMPLOYEE BENEFITS COMMITTEE, AS)
ADMINISTRATOR AND NAMED FIDUCIARY)
OF THE LILLY RETIREMENT PLAN, AND)
THE LILLY SEVERANCE PAY PLAN, AND)
THE ELI LILLY AND COMPANY HOLIDAY)
AND VACATION PLAN, AND THE LILLY)
HEALTH PLAN, AND THE LILLY DENTAL)
PLUS PLAN, AND PCS PHARMACY)
BENEFITS MANAGEMENT SERVICE)
PROGRAM; LILLY GLOBAL SHARES STOCK)
OPTION PLAN,)
Appellants)
)

(AMENDED AS PER THE CLERK'S
6/19/08 ORDER)

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF
PENNSYLVANIA
(D.C. Civil No. 03-cv-04848)
District Judge: The Honorable James Knoll Gardner

Present: McKEE, Chief Judge, SLOVITER,
SCIRICA, RENDELL, BARRY, AMBRO, FUENTES,
SMITH, FISHER, CHAGARES, JORDAN, and

GREENBERG* Circuit Judges, and ACKERMAN**, District Judge

SUR PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

The petition for rehearing en banc filed by Appellee having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing en banc is DENIED.

BY THE COURT:

/s/Maryanne Trump Barry
Circuit Judge

Dated: August 26, 2010

* The vote of Judge Greenberg is limited to panel rehearing.

** At the time this matter was submitted to the Court, Judge Ackerman, who sat by designation was a member of the panel. Judge Ackerman passed away December 2, 2009.

APPENDIX D

OFFICE OF THE CLERK

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA 19106-1790
Website: www.ca3.uscourts.gov

MARCIA M. WALDRON
CLERK

TELEPHONE
215-597-2995

September 7, 2010

Michael Kunz, Clerk
United States District Court
for the Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street
Room 2609
Philadelphia, PA 19106-1797

RE: Schwing v. Lilly Health Plan, et al
Case Number: 06-4671
District Case Number: 03-cv-04848

Dear District Court Clerk,
Enclosed herewith is the certified judgment together with copy of the opinion in the above-captioned case(s). The certified judgment is issued in lieu of a formal mandate and is to be treated in all respects as a mandate.

Counsel are advised of the issuance of the mandate by copy of this letter. The certified judgment is also enclosed showing costs taxed, if any.

Very truly yours,

/s/Marcia M. Waldron
Marcia M. Waldron, Clerk

By: Aina/jk
Case Manager
267-299-4957

cc: Ellen E. Boshkoff, Esq.
Philip J. Gutwein II, Esq.
Michael S. Misher, Esq.
Joseph M. Toddy I, Esq.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-4671

[Filed April 14, 2009]

ESTATE OF KEVIN SCHWING)
)
v.)
)
THE LILLY HEALTH PLAN; THE ELI LILLY)
AND COMPANY LIFE INSURANCE AND)
DEATH BENEFIT PLAN; THE ELI LILLY)
AND COMPANY HEALTH CARE FLEXIBLE)
SPENDING PLAN; THE ELI LILLY AND)
COMPANY DEPENDENT DAY CARE)
FLEXIBLE SPENDING PLAN; THE LILLY)
SEVERANCE PAY PLAN; THE ELI LILLY)
AND COMPANY HOLIDAY AND VACATION)
PLAN; THE LILLY DENTAL PLUS PLAN;)
PCS PHARMACY BENEFITS MANAGEMENT)
SERVICE PROGRAM; THE LILLY)
EMPLOYEE SAVINGS PLAN; THE LILLY)
RETIREMENT PLAN; ELI LILLY AND)
COMPANY, INDIVIDUALLY AND AS PLAN)
SPONSOR, FIDUCIARY AND)
ADMINISTRATOR OF THE LILLY)
RETIREMENT PLAN, AND THE LILLY)
SEVERANCE PAY PLAN, AND THE ELI)
LILLY AND COMPANY HOLIDAY AND)
VACATION PLAN, AND THE LILLY HEALTH)
PLAN, AND THE LILLY DENTAL PLUS)
PLAN, AND PCS PHARMACY BENEFITS)
MANAGEMENT SERVICE PROGRAM; THE)
EMPLOYEE BENEFITS COMMITTEE, AS)

ADMINISTRATOR AND NAMED FIDUCIARY)
OF THE LILLY RETIREMENT PLAN, AND)
THE LILLY SEVERANCE PAY PLAN, AND)
THE ELI LILLY AND COMPANY HOLIDAY)
AND VACATION PLAN, AND THE LILLY)
HEALTH PLAN, AND THE LILLY DENTAL)
PLUS PLAN, AND PCS PHARMACY)
BENEFITS MANAGEMENT SERVICE)
PROGRAM; LILLY GLOBAL SHARES STOCK)
OPTION PLAN,)
)
Appellants)
)

(AMENDED AS PER THE CLERK'S
6/19/08 ORDER)

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT
OF PENNSYLVANIA
(D.C. Civil No. 03-cv-04848)
District Judge: The Honorable James Knoll Gardner

Argued: March 5, 2009

Before: BARRY, GREENBERG, Circuit Judges, and
ACKERMAN,* District Judge

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* Honorable Harold A. Ackerman, Senior United States District Judge for the District of New Jersey, sitting by designation.

JUDGMENT

This cause came to be heard on appeal from the United States District Court for the Eastern District of Pennsylvania and was argued on March 5, 2009.

After consideration of all the contentions raised, it is

ADJUDGED and ORDERED that the judgment of the District Court be and hereby is reversed. All in accordance with the Opinion of the Court.

ATTEST:

/s/ Marcia M. Waldron
Marcia M. Waldron, Clerk

Dated: April 14, 2009

[SEAL]
Certified as a copy and issued in lieu of a formal mandate on September 7, 2010

Teste: /s/Marcia M. Waldron
Clerk, U.S. Court of Appeals for the Third Circuit